





# THE INDIAN LAW REPORTS

---

1909.

FEBRUARY 1.

(Pages 53 to 122)

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## BOMBAY SERIES

CONTAINING

CASES, DETERMINED BY THE HIGH COURT AT BOMBAY AND BY  
THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL  
ON APPEAL FROM THAT COURT.

REPORTED BY

Privy Council .. J. V. WOODMAN (*Volume Twenty*)  
High Court, Bombay .. W. I. WILLIAMS (*Volume Twenty*)

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BOMBAY.

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large mass of accounts, objections and surcharges were filed by the various parties. On appearing before the Assistant Commissioner the parties came to an understanding that the matter in dispute should be left to be decided by the Assistant Commissioner in a summary manner without going into formal evidence beyond the accounts, objections	

... defendants with their attorney  
... had agreed to the above  
... Assistant Commissioner  
... in his proposal and told  
... on them. To this they  
... the defendant even saying he would take one rupee if that was the  
sum awarded to him. It was also agreed that the Assistant Commissioner  
should draw up his findings in the form of a consent decree to be taken by the  
parties as that would save the parties a large sum in cost. At another  
meeting before the Assistant Commissioner the latter recorded his findings  
and then proceeded to draw up the consent decree embodying these findings  
therein but the defendants I and G refused to be bound by his decision. Upon  
application being made by the plaintiff that an adjustment of the suit might  
be recorded under section 373 of the Civil Procedure Code on the basis of the  
Assistant Commissioner's decision,

*Held*, that there had been no adjustment of the suit. There had been no  
written submission to arbitration as provided by section 1 of the Indian  
Arbitration Act, and, consequently, there had been no legal and valid reference  
to arbitration and the Assistant Commissioner's award (for it really was an  
award and nothing else) had no legal foundation, and could therefore have no  
legal consequences. As there had been no reference to arbitration and no  
award there could be no adjustment to give effect to under section 373 of the  
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after her remarriage*—*It is not valid*

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where to one  
to give in

*Panchappa v. Sanginbasawa* (1892) 24 Bom. 69, considered.

*POTLABAI v. MAHADU* ... (1908) 33 Bom. 197

*Hindu Law—Adoption by a widow—Alienation by the widow prior  
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Where a Hindu widow, who has inherited her husband's property, adopts a son,  
the adoption has the effect of divesting her of the property and putting an end

confer on her any right to the estate or entitle her to transfer it by way of sale  
or mortgage

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defendants with their attorney  
 they had agreed to the above  
 the Assistant Commissioner  
 in turn his proposal and told  
 them that whatever award he made would be binding on them. To this they  
 assented. If that was the  
 Assistant Commissioner  
 be taken by the  
 order. At another  
 meeting before the Assistant Commissioner the latter recorded his findings  
 and then proceeded to draw up the consent decree embodying these findings.  
 Thereafter the defendants 1 and 6 refused to be bound by his decision. Upon  
 application being made by the plaintiff that an adjustment of the suit might  
 be recorded under section 37 of the Civil Procedure Code on the basis of the  
 Assistant Commissioner's decision.

*Held*, that there had been no adjustment of the suit. There had been no  
 written submission to arbitration as provided by section 4 of the Indian  
 Arbitration Act, and, consequently, there had been no legal and valid reference  
 to arbitration and the Assistant Commissioner's award (for it really was an  
 award and nothing else) had no legal foundation, and could therefore have no  
 legal consequences. As there had been no reference to arbitration and no  
 award there could be no adjustment to give effect to under section 37 of the  
 Civil Procedure Code.

*Sambai v Premji Prayji* (1895) 20 Bom. 301 and *Pragdas v. Gurdhardas*  
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**ADOPTION**—Gift of a son by first husband in adoption by a Hindu widow

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*Panchappa v Sanginbasawa* (1899) 24 Bom. 89, considered

*POTLABAI v. MAHADU* . . . . . (1903) 33 Bom. 127

by the widow prior  
 to the alienation,  
 erty, adopts a son,  
 and putting an end  
 to the effect as her  
 right of maintenance  
 of it, does not  
 it by way of sale

or mortgage.

of the inheritance there  
 or necessary purpose,  
 the transfer,  
 on, and





operate during the time that the estate was represented by her as heir and the result of the adoption is to terminate that estate.

*Lakshman v. Radhaji* (1887) 11 Bom. 600 and *Moro v. Bolyi* (1894) 19 Bom. 809, followed. *Sreeramulu v. Arustamma* (1902) 26 Mad. 143, not followed.

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so recommended

Against the order of the District Judge an appeal was preferred to the High Court.

Held, that no appeal lay The District Judge's order was passed under section 505 of the Civil Procedure Code (Act XIV of 1882) and not under section 503 It was therefore an order which was not appealable not being specified in the 1st of orders in section 583

*Birajan Koor v. Ram Churn Lall Mahata* (1881) 7 Cal. 719, followed.

BAI MANI v. KUMICHAND ... .. (1909) 33 Bom. 104

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See BHAGDARI ACT ... .. 116

**BHAGDARI ACT—(BOM ACT V OF 1862), sec 3—***Bhag—Unrecognised subdivision of a lig—Alienation—Suit to set aside the alienation—Limitation* [Possession acquired under an alienation made in contravention of section 3 of the Bhagdari Act (Bom Act V of 1862) can become adverse so as to bar a suit for recovery by the individual alienor or his representatives in interest.]

The Bhagdari Act (Bom Act V of 1862) contains nothing which by express provision or necessary implication abrogates the law of limitation in favour of a private person

*Dala v. Parag* (1902) 1 Bom. L. R. 797 and *Jethabhai v. Nathabhai* (1904) 23 Bom 299, distinguished

ADAM UMAR & HARU RAJANI ... (1908) 33 Bom 116

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See BHAGDARI ACT ... 116

*Jethabhai v. Nathabhai* (1904) 23 Bom 299, distinguished.

See BHAGDARI ACT ... 116

*Lakshman v. Radhabai* (1887) 11 Bom 609, followed.

See HINDU LAW ... 88

*Moro v. Dalaji* (1894) 19 Bom 803, followed

See HINDU LAW ... 88

*Panchappa v. Sangambasawa* (1899) 24 Bom. 80, considered d.

See HINDU WIDOW RE MARRIAGE ACT ... 167

*Pragaji v. Girdhardas* (1901) 26 Bom 76, considered and distinguished

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*Simsu v. Premji Prajji* (1895) 20 Bom 394, considered and distinguished

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*Sreeramulu v. Kristamma* (1902) 26 Mad 143, not followed.

See HINDU LAW ... 88

**CHARGES—Joinder of charges—Misjoinder of charges—Indian Penal Code (Act XLV of 1860), secs 124A, 133A—Criminal Procedure Code (Act V of 1898), secs 225, 233, 234, 235, 236 and 237**

See CRIMINAL PROCEDURE CODE ... 77

**CIVIL PROCEDURE CODE (ACT XIV OF 1882), sec. 375—Suit for Administration—Reference to Commissioner—Parties agreeing orally to submit to**







objections and surcharges filed before him. The 1st and 6th defendants with their attorney were present at this meeting and after their attorney had agreed to the above course suggested by the Assistant Commissioner, the Assistant Commissioner himself explained to the 1st and 6th defendants in turn his proposal and told them that whatever award he made would be binding on them. To this they agreed, the 1st defendant even saying he would take one rupee if that was the sum awarded to him. It was also agreed that the Assistant Commissioner should draw up his findings in the form of a consent decree to be taken by the parties as that would save the parties a large sum in costs. At another meeting before the Assistant Commissioner the latter recorded his findings and then proceeded to draw up the consent decree embodying these findings therein but the defendants 1 and 6 refused to be bound by his decision. Upon application being made by the plaintiff that an adjustment of the suit might be recorded under section 375 of the Civil Procedure Code on the basis of the Assistant Commissioner's decision,

*Held*, that there had been no adjustment of the suit. There had been no written submission to arbitration as provided by section 4 of the Indian Arbitration Act, and *no valid reference to arbitration and award and nothing legal consequences* (for it really was an *id* therefore have no *reference to arbitration and no award there could be no adjustment to give effect to under section 375 of the Civil Procedure Code*

*Sambas v. Premji Pragsi* (1895) 20 Bom 204 and *Progdas v. Giridhardas* (1901) 26 Bom 76, considered and distinguished.

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against the order of the District Judge an appeal was preferred to the High Court.

*Held*, that no appeal lay. The District Judge's order was passed under section 503 of the Civil Procedure Code (Act XIV of 1882) and not under section 503. It was therefore an order which was not appealable not being specified in the list of orders in section 588.

*Birajan Koor v. Ram Churn Lal Mahata* (1891) 7 Cal. 710, followed.

*Bai Mani v. Khinchani*

(1909) 33 Bom 104

CRIMINAL PROCEDURE CODE (ACT V OF 1898), SECS. 225, 233, 234, 235, 236 AND 237—Charges—Joinder of charges—Disjoinder of charges—Indian Penal Code (Act XLV of 1860), secs 121A and 153A—Sedition—Promoting enmity, etc., between classes—Publication of seditious matter—121A and each of the Hinc of the ne the Prea Bombay convicted on contended in paper in Bom

*Held*, that the evidence on record was sufficient to prove the publication of the newspaper in Bombay.

*Held*, further, that the trial was not bad as there had been no misjoinder of charges.

\*mode in which the charges were drawn up. The defect, if any, was no more than a mere irregularity, cured by the provisions of section 225 of the Code of Criminal Procedure.

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EMPEROR & TRIBHUVANDAS

(1908) 33 Bom 77

EMPEROR v. TRIEHOVANDAS  
ESTOPPEL—Transfer of Property Act (IV of 1882), sec. 55, cl. (3) (b) cl. (6)—  
Vendors lien for unpaid purchase-money—Sale-deed containing acknowledgment  
—Evidence Act (I of 1872), sec. 115 ]  
consideration in full and made acknowledgment of the vendor at the  
foot of the deed to the same effect The vendor had also parted with all the

se-money by her declaration as  
by her act in handing over the  
title deeds.

*Per BATCHELLOR, J.*—A vendor of immoveable property who endorses upon the purchase-deed a receipt for the purchase-money cannot set up a lien for unpaid purchase-money as against a mortgagee for value without notice under the purchaser.

TEHILRAM v. KASHIRAI ... (1908) 33 Bom. 53

EVIDENCE ACT (I OF 1872), sec. 115—Vendor's lien for unpaid purchase-money—Sale deed containing acknowledgment of receipt of consideration money in full—Mortgagee taking the mortgage without notice of unpaid purchase-money—Estoppel—Transfer of Property Act (II of 1882), sec. 55, cl. (1) (b), cl. (6)

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HINDU LAW—Adoption—Adoption by a widow—Alienation by the widow prior to the date of adoption—Right of the adopted son to dispute the alienation.] Where a Hindu widow, who has inherited her husband's property, adopts a son, the adoption has the effect of divesting her of the property and putting an end to her estate as heir of her husband. The adoption has the same effect as her death with this difference that after the adoption she has a right of maintenance against the adopted son during the rest of her life. But the right of maintenance so long as it is not a charge on the estate or any portion of it, does not confer on her any right to the estate or entitle her to transfer it by way of sale or mortgage

Thus, if a widow, before the adoption severs a portion of the inheritance therefrom and transfers it to a stranger, without any proper or necessary purpose binding the estate absolutely according to Hindu Law, the transfer, logically speaking, must cease to have any effect after the adoption, since it could only operate during the time that the estate was represented by her as heir and the result of the adoption is to terminate that estate.

*Lakshman v Radhabai* (1887) 11 Bom 603 and *Moro v. Balaji* (1924) 19 Bom. 809, followed *Sreeramulu v. Kristamma* (1902) 26 Mad. 143, not followed.

RAMAKRISHNA v. TRIPURABAI ... (1908) 33 Bom. 88

Widow—Gift of a son by first husband in adoption by widow after her re marriage—Hindu Widow Re-marriage Act (XV of 1836), secs. 2, 3, 4 and 5.

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HINDU WIDOW RE-MARRIAGE ACT (XV OF 1836), SECS. 2, 3, 4 AND 5

tion 3, may, under the other relations of for that is a right wh

*Panchappa v. San*

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JOINDER OF CHARGES—Charges—Mivjoinder of charges—Indian Penal Code (Act XLV of 1860), secs. 124A, 153A—Criminal Procedure Code (Act V of 1898), secs. 225, 233, 234, 235, 236 and 237.

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Where some of the parties to a decree appeal against it, the decree in appeal is the final decree for the purpose of execution with respect to all the parties

SHIVRAM v. SAKHARAM ... .. (1901) 33 Bom 39

**COMPENSATION—Compulsory acquisition of land—Method of hypothetical development for fixing value of land to be acquired—Charges as to the costs of building**  
*the result is that the speculator is to be excluded from*

The value of the land to the owner is what must be regarded, and that is the price which it will fetch if disposed of on most profitable terms. The owner is to be deemed to be the best person to sell his land by reason of his position. If the sale of the land is made by the speculator, then, no doubt, the costs and other charges of the speculator. But the claimant is not to be debited with these expenses unless the introduction of the speculator is a commercial necessity. And there is no necessary reason why the claimant should be driven to have recourse to the speculator for a business which he can do for himself.

When compensation is fixed on the general principle of a sale of the land split up into parcels suitable for building, it is not only necessary but inappropriate to make a special deduction on account of the small area marked off for the roadway.

Where the method of hypothetical development is employed for assessing compensation, the value of the land is to be ascertained by reference to the value of the land, and the result, it follows, is that the method of hypothetical development is itself corroborated.

In the method of assessing compensation, the value of the land is to be ascertained by reference to the value of the land, and the result, it follows, is that the method of hypothetical development is itself corroborated.

TRUSTEES FOR THE IMPROVEMENT OF THE CITY OF BOMBAY v. KARSANDAS ... .. (1908) 33 Bom. 28

**CONSTRUCTIVE NOTICE—Mortgagor and mortgagee—Mortgage by executors and residuary legatees of property which was subject to a charge under the will—Deposit of title deeds previously with mortgagees—Mortgagee's omission to investigate title—Creditors and legatees under will—Lapse of time between testator's death and execution of mortgage, effect of**

See MORTGAGOR AND MORTGAGEE ... ..

**COURT-FEE—Petition of complainant—Contract Act (XIII)—Compensation Act**  
 Where a woman sues the advance and repays the same it is not competent to the Magistrate to make him pay to the complainant the Court-fee paid on the petition of complaint.

EMPEROR v. DHONDU ... .. (1904) 33 Bom. 22









There is no substantial distinction, in regard to questions arising in execution, between the position of legal representatives added as parties to the suit before decree and legal representatives brought in after decree. All questions between them and the decree holder relating to execution must alike be disposed of under section 244 of the Civil Procedure Code (Act XIV of 1952)

Where some of the parties to a decree appeal against it, the decree in appeal is the final decree for the purpose of execution with respect to all the parties

SHIVRAM v SAKHARAM . . . . . (1908) 33 Bom. 39

HINDU LAW—Widow—Maintenance—Widow living her husband's property in her hands—The property sufficient to maintain her for some years—Suit for declaration and for arrears of maintenance—Interim decree.

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... producing the same result—Compulsory acquisition of land

See LAND ACQUISITION . . . . . 28

LAND . . . . .  
... producing the same result that it specu- from

The value of the land to the owner is what must be regarded, and that is the price which it will fetch if disposed of on most profitable terms. The owner is not to be deprived of the opportunity of selling his land by reason of the introduction of the speculator. If the sale of the land is made by the speculator, then, no doubt, the costs and other charges of the speculator. But the claimant is not to be debited with these expenses unless the introduction of the speculator is a commercial necessity. And there is no necessary reason why the claimant should be driven to have recourse to the speculator for a business which he can do for himself.

When compensation is fixed on the general principle of a sale of the land split up into parcels suitable for building, it is not only necessary but inappropriate to make a special deduction on account of the small area marked off for the roadway.

Where the method of valuation is by reference to prices realised by sales of neighbouring lands, it is plain that no evidence of former sales can be obtained which shall be precisely parallel in all its circumstances to the

sale of the particular land in question. Differences small or great exist in various conditions, and what precise allowance should be made for those differences is not a matter which can be reduced to any hard and fast rule

TELETYPE FOR THE IMPROVEMENT OF THE CITY OF BOMBAY v KARSONDAS (1908) 33 Bom

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*—Appeal by some of the*  
*—Civil Procedure Code*

See HINDU LAW

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MAINTENANCE—*Hindu widow—Widow having her husband's property in her hands—The property sufficient to maintain her for some years—Suit for declaration and for arrears of maintenance—Prenatal suit* ] The plaintiff, a Hindu widow, filed a suit to recover arrears of maintenance and to obtain a declaration of her right to maintenance. At the time the suit was brought, she was found to be in possession of a fund belonging to her husband's family estate, which sum was sufficient to provide for her maintenance for five years at the rate allowed by the lower Court.

*Held*, that no cause of action had accrued to the plaintiff. At the date when the suit was brought, the Court was not in a position to forecast events or to anticipate the position of affairs five years later

DATTATRAYA WAMAN v RUKHMADEI ... (1903) 33 Bom.

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MITAKSHARA—*Liability of sons to pay father's debt—Hindu Law.*  
 See HINDU LAW

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Registrar  
 body of  
 of 1832,

See TRANSFER OF PROPERTY ACT

11

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*a decree—Decree in  
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Where some of the  
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... (1903) 33 Bom. 39

APPEAL COURT—*Criminal jurisdiction—Order to furnish security—Criminal  
Procedure Code (Act V of 1898), sec. 106 (3)*

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and it was witnessed by him. The deed was not attested by two witnesses as required by s. 107 of the Transfer of Property Act (IV of 1882).

Held, that neither the signature of the Sub Registrar nor the statement by the writer that the body of the document was written by him were sufficient for creating a valid mortgage.

An attesting witness is a "witness who has seen the deed executed and who testifies as such."

*Law v. Seelabury* (1817) 10 C. & F. 310 followed

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**EASE**—Mortgage with possession—Lease to mortgagor—Death of the mortgagor and his surviving undivided brother—Sister entitled as heir—Possession and management by mortgagee's widow—Payment of the rent by the tenant in good faith to mortgagee's widow—Suit by sister for recovery of rent—Assignment by lessor not necessary—Transfer of Property Act (IV of 1882), sec. 50

See TRANSFER OF PROPERTY ACT . . . . . 96

**LIT.**—Tenor's lien for unpaid purchase-money—Sale-deed containing acknowledgment of receipt of consideration money in full—Mortgagee taking the mortgage without notice of unpaid purchase-money—Lutpelt—Evidence Act (I of 1872), sec. 115—Transfer of Property Act (IV of 1882), sec. 50, cl. (4) (b), cl. (6).

See TRANSFER OF PROPERTY ACT . . . . . 53

**LIMITATION**—Bhagdari Act (Bombay Act V of 1862), sec. 3—Bhag—Unrecognized sub-division of a bhag—Alienation—Suit to set aside the alienation ] Possession acquired under an alienation made in contravention of section 3 of the Bhagdari Act (Bombay Act V of 1862) can become adverse so as to bar a suit for recovery by the individual alienor or his representatives in interest.

The Bhagdari Act (Bombay Act V of 1862) contains nothing which by express provision or necessary implication abrogates the law of limitation in favour of a private person

*Dada v. Parag* (1902) 4 Bom. L. R. 797 and *Jethabhai v. Nathabhai* (1904) 23 Bom. 299, distinguished

ADAM UNAB v. HAPU BAWAJI . . . . . (1903) 33 Bom. 116

**MISJOINDER OF CHARGES**—Penal Code (Act XLV of 1860), secs. 124 A, 153 A—Sedition—Promoting enmity, etc., between classes—Publication, what constitutes—Criminal Procedure Code (Act V of 1898), secs. 223, 234, 235, 236 and 237.

See CRIMINAL PROCEDURE CODE . . . . . 77

**MORTGAGE**—Transfer of Property Act (IV of 1882), sec. 50—Mortgage with possession—Lease to mortgagor—Death of the mortgagor and his surviving undivided brother—Sister entitled as heir—Possession and management by mortgagee's widow—Payment of the rent by the tenant in good faith to mortgagee's widow—Suit by sister for recovery of rent—Assignment by lessor not necessary.] On the 14th December 1895 Lingappa mortgaged with possession certain property to Subraya who on the same day let out the property to Lingappa for twelve years. Subsequently Subraya having died his interest as mortgagee survived to his undivided brother Ramkrishna. Ramkrishna died in the year 1901 and thereafter possession and management of the property was taken by Subraya's widow Gowri. She got her name placed on the khata as owner of the property and recovered rent from the tenant for the years 1902 and 1903. The person entitled to the property was Kaveriamma as the sister and heir of Subraya and Ramkrishna and she brought a suit against the tenant for the recovery of rent of the said years on the ground that Gowri had no authority to receive rent and give discharge for the same.

*Held*, that the defendant was not chargeable with rent sued for. Section 50 of the Transfer of Property Act (IV of 1882) was applicable inasmuch as the defendant in making the payment to Gowri acted in good faith and had no notice of the plaintiff's interest in the property. The language of the section is general and no assignment by the lessor during the tenancy was necessary.

KAVERIAMMA v. LINGAPPA . . . . . (1903) 53 Bom. 93

**PENAL CODE (ACT XLV OF 1860)**, secs. 121A, 153A—Sedition—Promoting enmity, &c., between classes—Publication, what constitutes—Criminal Procedure—





Code (Act V of 1898), secs 223, 233, 234, 235, 236 and 237—*Charges—Joinder of charges—Misjoinder of charges.* The accused was charged at one trial with the articles At

that there was no evidence of the publication of the newspaper in Bombay, and that there was a misjoinder of charges vitiating the trial,

*Held*, that the evidence on record was sufficient to prove the publication of the newspaper in Bombay

*Held*, further, that the trial was not bad as there had been no misjoinder of charges

EMPEROR v TRIBHUVANDAS ... (1908) 33 Bom, 77

RECEIVER—*Recommendation by Subordinate Judge of a person to be appointed receiver—Refusal by District Judge—Appeal—Civil Procedure Code (Act XIV of 1882), secs 563, 503 and 588*

See CIVIL PROCEDURE CODE ... 101

RENT—*Mortgage with possession—Lease to mortgagor—Death of the mortgagor and his surviving undivided brother—Sister entitled as heir—Possession and the rent by the tenant in good very of rent—Assignment by of 1882), sec. 50*

See TRANSFER OF PROPERTY ACT ... 96

*les—Promoting enmity, &c., between classes 1860), secs 121A, 159A—Charges—Joinder Criminal Procedure Code (Act V of 1898),*

See CRIMINAL PROCEDURE CODE ... 77

TRANSFER OF PROPERTY ACT (IV OF 1882), sec 50—*Mortgage with possession—Lease to mortgagor—Death of the mortgagor and his surviving undivided brother—Sister entitled as heir—Possession and mortgage*

... mortgagee survived to the year 1901 and taken by Subraya's and recovered rent from the ... on the khata as owner of the property

*Held* that the defendant was not chargeable with rent sued for Section 50 of the Transfer of Property Act (IV of 1882) was applicable inasmuch as the defendant in making the payment to Gown acted in good faith and had no notice

plaintiff interest in the property. The language of the section is general and does not limit the time during the tenancy was necessary

INTEREST IN A PARTIAL ... (190) 33 Bom 94

ADoption (F I POPULAR ACT (IV OF 1882) sec 5, cl (4) (b) cl (6) —

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part of the deed to the same effect. The vendor had also parted with all the title-deeds relating to the property. The vendor subsequently mortgaged the property to the plaintiff who had no knowledge that the full amount of the consideration money was not paid to the vendor though he knew that the vendor was in possession of some portion of the property,

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*Per NATCHERON J* — A vendor of immovable property who endorses upon the purchase deed a receipt for the purchase money cannot set up a lien for unpaid purchase money as against a mortgagee for value without notice under the purchaser

TRILAKSHMI & KASHINATH (1908) 33 Bom 53

WIDOW — Adoption by a widow — Alienation by the widow prior to the date of adoption — Right of the adopted son to dispute the alienation — Hindu Law

See HINDU LAW 69

Gift of a son by first husband in adoption by widow after her re-marriage — Hindu Widow Re-marriage Act (XV of 1836), ss 2, 3, 4 and 5

See ADOPTION 107

WORDS AND PHRASES —

'Adjustment of suit,' what is

See CIVIL PROCEDURE CODE 69

WRITTEN

Parties

award —

suit & rates

See ADMINISTRATION SUIT 62







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Bombay except the declaration made by the accused under the Press Act, and the depositions of witnesses who received the newspaper in Bombay as Government servants in their capacity as such. The accused was convicted on both the charges and sentenced separately on each of them. It was contended in appeal that there was no evidence of the publication of the newspaper in Bombay, and that there was a misjoinder of charges vitiating the trial,	
<i>Held</i> , that the evidence on record was sufficient to prove the publication of the newspaper in Bombay	
<i>Held</i> , further, that the trial was not bad as there had been no misjoinder of charges	
EMERSON v TRIMHOVANDAS	... (1908) 33 Bom. 77
RECEIVER—Recommendation by Subordinate Judge of a person to be appointed receiver—Refusal by District Judge—Appeal—Civil Procedure Code (Act XIV of 1882), secs 503 504 and 585	
See CIVIL PROCEDURE CODE	... 101
RENT—Mortgage with possession—Lease to mortgagor—Death of the mortgagor and his surviving undivided brother—Sister entitled as heir—Possession and management by mortgagee's widow—Payment of the rent by the tenant in good faith to mortgagee's widow—Suit by sister for recovery of rent—Assignment by lessor not necessary—Transfer of Property Act (IV of 1882), sec 50	
See TRANSFER OF PROPERTY ACT	... 96
SEDITION—Publication, what constitutes—Promoting enmity, &c., between classes—Indian Penal Code (Act XLV of 1860), secs 124A 153A—Charges—Joinder of charges—Misjoinder of charges—Criminal Procedure Code (Act V of 1898), secs 225, 233 234 245, 236 and 237.	
See CRIMINAL PROCEDURE CODE	... 77
TRANSFER OF PROPERTY ACT (IV OF 1882), SEC 50—Mortgage with possession—Lease to mortgagor—Death of the mortgagor and his surviving undivided brother—Sister entitled as heir—Possession and management by mortgagee's widow—Payment of the rent by the tenant in good faith to mortgagee's widow—Suit by sister for recovery of rent—Assignment by lessor not necessary—Transfer of Property Act (IV of 1882), sec 50	
On the 14th December 186	
<i>Held</i> that the defendant was not chargeable with rent sued for. Section 50 of the Transfer of Property Act (IV of 1882) was applicable inasmuch as the defendant in making the payment to Gowri acted in good faith and had no notice	

of the plaintiff's interest in the property. The language of the section is general and no assignment by the lessor during the tenancy was necessary

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KATKESWARA P. IN A LA ... (190) 33 Bom 96

THE ANGLE OF POPULARITY ACT (IV OF 1892) SE 55, CL (1) (1) & (2)

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*Held*, that the defendant was estopped from contending that she had a lien on the chawl for the unpaid balance of the purchase-money by her declaration as to the receipt of the whole purchase money and by her act in handing over the title-deeds

*Per BATHURZEE J.*—A vendor of immovable property who endorses upon the purchase deed a receipt for the purchase-money cannot set up a lien for unpaid purchase-money as against a mortgagee for value without notice under the purchaser

TEHILDAW V KASHIDAR ... (1908) 33 Bom 53

WIDOW—Adoption by a widow—Alienation by the widow prior to the date of adoption—Right of the adopted son to dispute the alienation—Hindu Law

See HINDU LAW ... 89

Gift of a son by first husband in adoption by widow after her re-marriage—Hindu Widow Re-marriage Act (XV of 1856), sec 2, 3, 4 and 5

See ADOPTION ... 107

WORDS AND PHRASES —

"Adjustment of suit," what is

See CIVIL PROCEDURE CODE ... 69

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it has

See ADMINISTRATIVE SEIZURE ... 63



**SUMMARY TRIAL**—*Workman's Breach of Contract Act (XIII of 1859)*—*Inquiry under the Act—Summary trial not permissible.* An offence under the Workman's Breach of Contract Act, 1859, cannot be tried summarily.

*Pratap v. D'orda Krishna* (1901) 33 Bom 22, followed

**EMPLOYER & BALU** ... (1908) 33 Bom. 25

—*Workman's Breach of Contract Act (XIII of 1859), sec. 1, 2*  
—*Court-Fees Act (VII of 1870), sec. 31*—*Court-fee on petition of complaint—Liability of workman to pay.*

*See WORKMAN'S BREACH OF CONTRACT ACT* ... 22

**TITLE DEED, DISPOSIT OF**—*Mortgage by executors and residuary legatees of property which was subject to a charge under the will—Constructive notice—Nagjee's omission to investigate title—Creditors and legatees under will—Lapse of time between testator's death and execution of mortgage, effect of.*

*See MORTGAGEE AND MORTGAGEE* ... 1

**TRANSFER OF PROPERTY ACT (IV OF 1882) SEC 59**—*Dekhan Agriculturists' Bill of Act (XIII of 1879) sec. 63 (A)—Mortgage deed—Attestation by two witnesses—Signature by the Sub Registrar—Statement by the writer of the deed including the writing of the body of the document that it was written by him*

who was bound  
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*Held*, that neither the signature of the Sub Registrar nor the statement by the writer that the body of the document was written by him were sufficient for effecting a valid mortgage

An attesting witness is a "witness who has seen the deed executed and who signs it as a witness"

*Burdett v. Spilsbury* (1843) 10 C. & F 340, followed

**HANU & LAXMANBHO** ... (1905) 33 Bom 41

**WIDOW—Maintenance**—*Widow having her husband's property in her hands—The*

*Held*, that no cause of action had accrued to the plaintiff. At the date when the suit was brought, the Court was not in a position to forecast events or to anticipate the position of affairs five years later

**DATTATRAYA WAMAN & RUKHMANI** ... (1903) 33 Bom 50

**WILL**—*Mortgage by executors and residuary legatees of property which was subject to a charge under the will—Deposit of title deeds previously with mortgagees—Constructive notice—Mortgagees' omission to investigate title—Creditors and legatees under will—Lapse of time between testator's death and execution of mortgage, effect of*

*See MORTGAGEE AND MORTGAGEE* ...

*Held* (upholding the decision of the High Court) that under the circumstances the Bank had constructive notice of the charge under the will. The Bank had on the facts dealt with the mortgagors not as executors but as persons pledging their own property for their own debts, and under the circumstances took no better title than that which the debtors really had in the capacity in which they were dealt with, namely, residuary legatees.

*Held* also, that the plaintiffs being legatees the Bank took the property subject to the charge upon it created by the will. Distinction drawn between creditors and legatees in such a case. *Spencer's "Equitable Jurisdiction,"* Vol. II, page 370, referred to.

circumstance to be taken into account by two of the plaintiffs against the Bank, and that the same is not inconsistent with the facts unaffected by that cir-

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.. (1903) 23 Bcm

See MORTGAGE AND MORTGAGEE

NATHU PIRAJI v. UMEDMAL GADUMAL

(1908) 33 Bom 2

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Act V of 1898).

See CRIMINAL PROCEDURE CODE

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**SUMMARY TRIAL**—*Workman's Breach of Contract Act (XIII of 1853)*—*Inquiry under the Act*—*Summary trial not permissible*.] An offence under the Workman's Breach of Contract Act, 1853, cannot be tried summarily.

*Pratt v D'ada Krishna* (1901) 33 Bom 22, followed

**EMPLOYER & BALD** ... (1908) 33 Bom. 26

—*Workman's Breach of Contract Act (XIII of 1853)*, sec. 1, 2  
—*Court-fee Act (VII of 1870)*, sec. 31—*Court-fee on petition of complaint*—*Liability of workman to pay*.

**See WORKMAN'S BREACH OF CONTRACT ACT** ... 22

**TITLE DEED, DEPOSIT OF**—*Mortgage by executors and residuary legatees of property which was subject to a charge under the will*—*Constructive notice*—*Mortgagee's omission to investigate title*—*Creditors and legatees under will*—*Liability of heirs between testator's death and execution of mortgage, effect of*.

**See MORTGAGE AND MORTGAGEE** ... 1

**TRANSFER OF PROPERTY ACT (IV OF 1852)** sec. 50—*Dakhan Agricul-  
tural Relief Act (XIII of 1870)* sec. 63 (A)—*Mortgage deed*—*Attestation  
by two witnesses*—*Signature by the Sub Registrar*—*Statement by the writer of  
the deed in concluding the writing of the body of the document that it was written  
by him*] A deed of mortgage was signed by the Sub-Registrar who was bound

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erty Act (IV of 1852)

*Held*, that neither the signature of the Sub Registrar nor the statement by the writer that the body of the document was written by him were sufficient for effecting a valid mortgage

An attesting witness is a "witness who has seen the deed executed and who signs it as a witness"

*Burdett v. Spilbury* (1843) 10 C. & L 310, followed

**HAND & LAXMAREAO** ... (1903) 33 Bom 41

**WIDOW**—*Maintenance*—*Widow having her husband's property in her hands*—*The*

*Held*, that no cause of action had accrued to the plaintiff At the date when the suit was brought, the Court was not in a position to forecast events or to anticipate the position of affairs five years later

**DATTATRAYA WAMAN & RUKHABAI** ... (1908) 33 Bom. 50

... which was subject  
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and execution of  
mortgage, effect of

**See MORTGAGE AND MORTGAGEE** ... 1







WORKMAN'S BREACH OF CONTRACT ACT (XIII OF 1859)—*Inquiry under the Act—Summary trial not permissible*] An offence under the Workman's Breach of Contract Act, 1859, cannot be tried summarily.

*Imperor v. Dhondu Krishna* (1901) 33 Bom. 22, followed

*Imperor v. Balu*

... (1908) 33 Bom. 25

secs 1, 2—*Summary inquiry into an offence punishable under the Workman's Breach of Contract Act—Court Fees Act (VII of 1870) section 1—Court fee on petition of complaint—Liability of the workman to pay*] An offence under the Workman's Breach of Contract Act (XIII of 1859) cannot be tried summarily. A penal enactment must be construed strictly. The proceedings of the Magistrate, under the Act, up to and inclusive of the passing by him of an order for either the repayment of the advance or performance of the contract do not constitute a trial for any offence as defined in the Criminal Procedure Code.

In a proceeding under the Workman's Compensation Act where the workman admits the advances and repays the same it is not competent to the Magistrate to make him pay to the complainant the Court fee paid on the petition of complaint.

*Imperor v. Dhondu* ...

... (1901) 33 Bom. 22

THE  
INDIAN LAW REPORTS,  
Bombay Series.

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PRIVY COUNCIL\*.

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BANK OF BOMBAY AND OTHERS (DEFENDANTS) v. SULEMAN SONJI  
AND OTHERS (PLAINTIFFS) AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at Bombay]

1903.  
May 13, 14.  
Jul 31.

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*Mortgagor and Mortgagees—Mortgage by executors and residuary legatees of property which was subject to a charge under the will—Deposit of title-deeds previously with mortgagees—Constructive notice—Mortgagee's omission to investigate title—Creditors and legatees under will—Lapse of time between testator's death and execution of mortgage, effect of.*

A Hindu carrying on business in Bombay died in 1885 having executed a will by which he left to his four elder sons certain immovable property subject to a charge of Rs 30 000 in favour of his widow and four younger sons, and made his four elder sons executors and residuary legatees of his will directing them to carry on the business. After their father's death the elder sons in the course of their business transactions became indebted to the Bank of Bombay in respect of advances by the Bank, to secure which on 13th September 1900 (two of the younger sons being then minors), the elder sons deposited with the Bank by way of equitable mortgage certain title deeds relating to the property charged by the will, and on 12th January 1903 executed a mortgage of the same property in favour of the Bank for Rs 53 000 without stating the charge upon it. In one of the documents of title deposited with the Bank the title of the mortgagors was indicated, and had the Bank investigated the title (which they did not do) they would have been put upon inquiry and would

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\* Present — LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOTTE  
and SIR ARTHUR WILSON.

have become aware of the charge created on the property by the will. The younger sons only became aware of the transaction in June 1903 when the Bank advertised the property for sale under their mortgage. In a suit brought by them on 15th September 1903 against the Bank and the mortgagors to establish the priority of their charge over the mortgage to the Bank, the latter pleaded that the mortgage was made for valuable consideration, and that they were *bona fide* transferees without notice.

*Held* (upholding the decision of the High Court) that under the circumstances the Bank had constructive notice of the charge under the will. The Bank had on the facts dealt with the mortgagors not as executors but as persons pledging their own property for their own debts, and under the circumstances took no better title than that which their debtors really had in the capacity in which they were dealt with, namely, residuary legatees.

*In re Queale's Estate* (1) followed.

*Held* also that the plaintiffs being legatees the Bank took the property subject to the charge upon it created by the will. Distinction drawn between creditors and legatees in such a case. *Spence's "Equitable Jurisdiction,"* Vol. II, page 376, referred to.

By the terms of the will the legacy was to be made up and paid within six years after the testator's death which period expired in 1891 and the mortgage was not executed until eight years afterwards, and it was contended that assuming that the Bank had notice of the will they were entitled to assume that the executors were acting with the consent of the legatees (plaintiffs).

*Held* that, although in cases of this kind delay was a circumstance to be taken into consideration yet, having regard to the fact that two of the plaintiffs were still minors when the title deeds were deposited with the Bank, and that continued possession by the executors and mortgagors was not inconsistent with the purposes of the will, the rights of the parties were unaffected by that circumstance.

APPEAL from a decree (14th April 1904) of the High Court at Bombay in its appellate jurisdiction which reversed or varied a decree (23rd August 1904) passed by a Judge of the said Court sitting in exercise of its Original Civil Jurisdiction.

The main question for decision on this appeal was whether a mortgage, dated 12th January 1899, in favour of the appellants, the Bank of Bombay, had priority over the claims of certain pecuniary legatees under the will of one Somji Parpia deceased.

The testator was a Khoja Mahomedan, inhabitant of Bombay, who traded as a furniture dealer and died on 15th February

1885 H had a brother Dhanji, and both the brothers jointly purchased a house in Bhajipala Street, one of the properties now in dispute. Dhanji died childless in 1827 leaving his widow, Meenibai, as his heir.

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At Somji Parpia's death he left him surviving his widow Labai and eight sons of whom four were sons of a former wife, namely, Rahimtoola Somji Parpia the respondent Jaffer Somji, Goolam Hussein Somji and the respondent Alladin Somji. The four younger sons were the respondents Suleman Somji, Goolam Ali Somji, aged 4, Mahomed Somji, and Habib Somji (who were twins) aged 2.

The will of Somji Parpia was dated 13th February 1885, and by it, after enumerating the items of property belonging to him (which included the moiety of the house in Bhajipala Street, and the entirety of some land in Falkland Road on which the Elphinstone Theatre was erected and which then stood in the name of his son Goolam Hussein Somji) and defining his heirs made the following (among other) provisions:

*Clause 3*—I bequeath all my abovementioned property such as all the goods in the two shops outstanding debts claims and debts and the abovementioned moiety of the house situated in Bhajipala Street and the Theatre &c ( &c ) the whole of the (said) property and goods to the sons of my former deceased wife (namely) Rahimtulla Jaffer Gulam Hussein and Alladin (4 persons). None of (my) other heirs has any claim or title hereto. But as to the moiety of the abovementioned house belonging to me I exclude the right thereto of my elder son Rahimtulla and I reserve the right of my three sons only namely, Jaffer Gulam Hussein, and Alladin these three persons to (my) said moiety of the house. To the remaining property the abovementioned four persons are entitled in equal (shares).

*Clause 4*—For (my) remaining heirs I order my abovementioned sons (four persons) whose names are Rahimtulla Jaffer Gulam Hussein and Alladin, that they shall duly give and act in accordance with what is written below—

*Clause 5*—To my present surviving wife Labai and to her sons named Suleman Gulam Ali Mahomed and Habib my said elder sons four persons to whom I entrust all my goods and property shall within 6 years namely six years after my decease duly make up and pay Rs. 30,000 namely thirty thousand to my surviving wife and to her sons. The same shall be paid (to them) in the following manner. No interest on the said (sum of) money shall be paid up to the abovementioned period and upto that period there shall duly be paid Rs. 120, namely one hundred and twenty five every month, for

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SULEMAN  
BOMJI

house hold expenses and before the abovementioned sum of Rs 30 000 namely thirty thousand is fully made up if the betrothal (or marriage, &c) of any son or daughter should take place, then as to the proper (sum of) money that may be required for the expenses thereof the same shall truly be paid out of the (abovementioned) sum, and when the abovementioned sum of Rupees thirty thousand shall have been fully made up (and paid) then from that day the aforesaid (sum) of Rupees one hundred and twenty five, being the amount of the instalment payable every month for the expenses shall duly cease, that is to say, the same shall not be paid thereafter. Besides this my second surviving wife and her children shall have no manner of right or claim against the four persons (namely my) sons by my first deceased wife, or against my said goods and property in any way whatever.

*“ Clause 6 —*As to the (sum of) Rupees thirty thousand directed to be paid out of my abovementioned goods and property as a share of inheritance by my abovementioned elder sons (four persons) to my surviving wife and her sons mentioned in the 5th Clause, I appoint four persons as trustees in respect of the said (sum of) money. Their names are Jaffer Somji, Gulam Hussein Somji, Jaffer Ladhahbai Chata and my second surviving wife. I appoint these four persons (as trustees) and I direct them as follows. —The said (sum of) money shall truly be appropriated in accordance with what is written below. Out of the above mentioned sum of Rupees thirty thousand which my elder sons shall pay to my surviving wife and her sons (as a share of inheritance) the outlays on auspicious and inauspicious occasions whatever the same may come to — having been deducted, as to whatever sum may remain over, a good estate or a house shall be purchased therewith and given (to them). The same shall be purchased in the names of my surviving wife and her sons and given to them, or (the money) shall be deposited at interest at a good place and out of the income that may be realized therefrom, (moneys) shall be paid to my surviving wife during her lifetime for her and her children's lodging food and clothes and other expenses. And after the decease of my surviving wife when her youngest son shall come of age whatever property there may be (left out) of the said (sum of) Rs 3,000 the same shall truly be divided and given in equal shares to her children.

*“ Clause 9. —*I recommend my four elder sons mentioned in the 4th Clause as follows. —If my second surviving wife and her sons should live in peace and harmony with them (my sons) shall allow them to live in the moiety belonging to me of the said house situated in the Bhajipala Street.

*“ Clause 10 —*I recommend my said four elder sons, to whom I bequeath all my goods and property shop &c, as follows. —After my life-time they shall continue to carry on trade and business in my name and having come to an understanding between themselves and apportioned the respective shares they shall make a writing in respect thereof and shall carry on trade and business in accordance with their own free will and pleasure.

*“ Clause 12 —*I nominate or (and) appoint my said four sons named Rahimulla, Jaffer, Gulam Hussein and Alladin executors of (the) my said will.

Meenabai, the widow of Dhanji, died in 1889 leaving a will dated 18th December 1880 by which after reciting that the house in Bhajipala Street had belonged to Somji Parpia and her husband in equal shares, she bequeathed the half-share which came to her from her husband to Rahimtulla Somji Parpia whom she described in the will as her and her husband's adopted son.

After the death of Somji Parpia the four elder sons and the widow Labai (until her death in 1894) and the four younger sons all lived amicably in the house in Bhajipala Street, and the four elder sons took over the whole of the property and carried on business as Somji Parpia and Company the Bank of Bombay acting as their bankers, and in the course of their business they became largely indebted to the Bank, and eventually on 12th January 1899 executed in favour of the Bank the mortgage now in suit for Rs 52 000, as security for which they deposited with the Bank certain documents relating to the house in Bhajipala Street namely a copy of the will of Meenabai, and a conveyance dated 12th March 1881 by one Khan Mahomed Habibhoy and Karim Khatav to Dhanji Parpia, and others relating to the Elphinstone Theatre in Falkland Road namely, a copy of lease, dated 14th October 1892, by one Sha Mulchand Nensey to Gulam Hussein Somji Parpia, a conveyance dated 26th August 1882 by one Peerbhoy Nathu to Gulam Hussein Somji, and an Indenture dated August 22nd 1884 between one Javerbai and Gulam Hussein Somji. The mortgage included the house in Bhajipala Street and the land in Falkland Road with the theatre erected thereon which are in dispute on this appeal.

In June 1903 the Bank of Bombay, in exercise of the power contained in their mortgage, advertised the sale by public auction of the properties comprised in it whereupon the four younger sons of Somji Parpia gave notice in writing to the Bank that under the will of their father they claimed a charge on the properties in suit to the extent of Rs 30 000 and that if the properties were sold they should be sold subject to the charge. The Bank postponed the sale after having intimated in writing that the sale was to be of the right title and interest of the mortgagors.

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The four younger sons then, on 15th September 1900, filed the suit out of which the present appeal arose against the four elder sons and the Bank claiming a charge on the properties in suit in priority to that of the Bank for the balance they stated to be due to them in respect of the legacy of Rs 30 000. They alleged that the mortgage was executed in fraud of their rights and in breach of the trust imposed on the first four defendants by the will of Somji Parpia, and that the Bank took the mortgage with actual or constructive notice of the charge, and they asked for a decree for the due administration of the properties of the deceased Somji Parpia which they alleged became vested in the first four defendants as his executors and heirs, subject to the charge.

On 14th January 1904 before the suit came on for hearing the Bank of Bombay transferred their mortgage to one Dwarka Das Dharansey who was added as a defendant to the suit.

The defendant Rahimtulla did not defend the suit. The defences made by the other defendants appear from the issues which were as follows — (1) What was the property or properties conveyed by the mortgage of 12th January 1830? (2) Whether the plaintiffs have a charge on the property, the subject of the said mortgage? (3) Whether the Bank of Bombay were not *bona fide* transferees for value of the property mentioned in the said mortgage? (4) Whether the Bank of Bombay had notice of the charge, if any, in favour of the plaintiffs? (5) Whether the plaintiffs are entitled to the relief claimed or any part thereof? (6) Whether in any event plaintiffs have any claim to one moiety of the Bhajipala Street property subject to the said mortgage?

On these issues the first Court (CHANDAVARKAR, J) held that on the construction of Somji Parpia's will the plaintiffs had a charge on the properties conveyed by the mortgage, that the Bank had no actual notice of the charge made by the will, but that they had constructive notice of it from the recitals in Meenabai's will which was one of the documents deposited in their custody, that according to the law in India there was no distinction between the powers of an executor over the real pro-

perty and personal estate of a testator such as obtains in English law; that a purchaser or mortgagee from an executor who was also devisee obtained a free, complete, and valid title unaffected by the debts or legacies charged, unless it was clearly proved that the purchaser or mortgagee had notice of any fraud or breach of duty on the part of the devisee executor in the transaction, that the Bank did not know of the breach of trust on the part of the defendants 1 to 4 and was not a party to their fraud; and that the Bank were *bona fide* transferees for value of the properties comprised in their mortgage.

As to the findings on the 3rd and 4th issues the learned Judge said:

"If then I must presume from the fact that the Bank had notice of the contents in Meenabai's will that they had notice of the charge in plaintiffs' favour under their father's will and of the capacity of the defendants 1 to 4 as absolute devisees and executors, I must deal with the equities between the parties to the mortgage on the footing that defendants 1 to 4 mortgaged the properties to the Bank in both the capacities and gave a good title unless it be proved that the Bank had knowledge that the loans advanced by them which formed the consideration for the mortgage were the personal debts of defendants 1 to 4."

And after considering the evidence as to that and the circumstances of the case bearing on the matter he concluded:—

"Upon the whole then I am not satisfied that the Bank knew of the breach of trust on the part of the defendants 1 to 4 and was a party to their fraud."

"The truth of the matter appears to me to be this. Judging from the evidence and the surrounding circumstances neither Labai and her adult son plaintiff No. 1 nor defendants 1 to 4 had any idea that the legacy in favour of the former was a charge on the property. All the parties lived amicably in the same house and thought as defendants 1 to 4 had the property absolutely bequeathed to them under their father's will they had every right to alienate it. Defendants 1 to 4 began to trade on their own account and the parties thought that that would bring in more money to them and enable them to make up the legacy to Labai and her sons. It cannot be that Labai and plaintiff 1 were unaware of the fact that defendants 1 to 4 had deposited their deeds with the Bank and were contracting debts. They hoped to share in the profits which defendants 1 to 4 were expected to make out of their trade by having their legacy provided out of these profits. The Bank were not informed of the legacy or the will because the parties believed that the legacy had nothing to do with the property bequeathed to defendants 1 to 4. When however they saw that Ahmedbhai had fallen out with defendants 1 to 4 and the Bank

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were trying to enforce their rights under the mortgage, they (plaintiffs and defendants 1 to 4) found that plaintiffs had a charge and that that was a good weapon of attack. These are the probabilities of the case and they go to support the *bond fides* of the Bank \* \* \* \* \*

Chandavarkar, J., also held that Meenabai had no power to dispose of the moiety of the Bhaji Pala Street property by will and that therefore the half part of that moiety which devolved on the plaintiffs was unaffected by the mortgage, and that the theatre on the land in Falkland Road was included in the mortgage to the Bank.

The decree was that the Bank had a prior charge on the properties mortgaged which comprised three-fourth parts of the house in Bhaji Pala Street, and the entirety of the land and buildings in Falkland Road, that the plaintiffs were entitled to the remaining one fourth part of the house in Bhaji Pala Street, and they were entitled to a charge for the legacy in the will but ranking subsequently to the Bank's mortgage.

From that decision the plaintiffs appealed and the Bank and Dwarkadas Dharamsey filed cross objections claiming that the whole of the house in Bhaji Pala Street was comprised in their mortgage. The first four defendants appealed from the finding that the mortgage included the building on the land in Falkland Road.

The appeals were heard by Sir L. JENKINS C. J., and BATT, J., who agreed with the lower Court that the plaintiffs had a charge on the property, that the Bank had constructive notice of the will, and that there is according to Indian law no such distinction as there is in English law between moveable and immovable property, but they held without impeaching the *bond fides* of the Bank, that the Bank's mortgage was subject to the payment of the plaintiff's legacy of Rs 30,000. The material portion of the judgment, which was delivered by the Chief Justice, was as follows —

' Though the 1st four defendants derive their title from the will of their father it is not suggested that this was known to the Bank. This was it of knowledge was no notice any concealment on the part of the mortgagors, the Bank made no investigation of title, and so far as the mortgage of the 12th

January 1893 goes took this security without any enquiry, assuming that the mortgagors were the owners of the property mortgaged. But ignorance resulting from abstention to make the ordinary investigations and enquiries cannot better the Bank's position. In not investigating the title under which he takes a person is ordinarily guilty of great and culpable negligence (*Jones v. Smith*<sup>(1)</sup> and *Nesom v. Clarkson*<sup>(2)</sup>) which disentitles him from defeating claims that would have come to his notice had he exercised reasonable care.

"The title therefore under the mortgage must be judged as though the Bank had actual notice of the will and its contents. What then would have been its knowledge with that notice? It would have seen that in his will the testator gave a list of his properties, that he gave all those properties to his four sons, the first four defendants, that he directed those four sons to whom, as he said, he *entrusted all his goods and property* to pay within 6 years the legacy in respect of which the plaintiffs now claim, that he described that legacy as directed to be paid out of his *above-mentioned goods and property as a share of inheritance* by the first four defendants, and that he appointed his first four sons executors of his will.

"And so we have to see how matters would have stood had the Bank taken the mortgage with that knowledge.

"It must be borne in mind that for this purpose there is no such distinction here, as there has been in England between moveable and immovable property. The English authorities, therefore, which appear to me most pertinent, are those that relate to the disposition by executors of personal estate, and they have not been cited in argument either here or before the first Court. These authorities may legitimately be considered far in regard to the questions at issue the law here and in England runs on parallel lines.

"I will first then consider the first four defendants' power to effect the mortgage as executors of their father's will.

"Executors have a full power of disposal over their testator's estate, and generally speaking neither creditors nor legatees can follow assets aliened for value in exercise of that power. And so strong is this rule, that the alienances for value are safe in their title though the alienation was for a purpose foreign to the will, if they do so without notice of this vice. But if the alienances take with notice, then they are in no better position than the executors from whom they claim, and the assets can be followed in their hands both by creditors and by legatees who have been prejudicially affected. *Elliot v. Merriman*<sup>(3)</sup>, *Donney v. Rigby*<sup>(4)</sup>, *Hill v. Simpson*<sup>(5)</sup>.

(1) (1843) 11 All. 241 at p. 253 1 Ha. 433 (2) (1754) 1 Cas. Ch. 145 cit. 1 in

(3) (1842) 2 Har. 163 at p. 173

1 Bro. Cl. C. 130.

(4) (1743) Barn. 7 2 At. 41

(5) (1802) 1 Cr. Jan. 52.

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' We must therefore see whether in this case the money intended to be secured by the mortgage was applied in accordance with the duties of the first four defendants as executors. It is clear it was not it was applied wholly for the private purposes of the executors, and thus was a devastation of the testator's assets.

' Then had the Bank notice of this? We start with the fact that the Bank admittedly did not deal with the first four defendants as executors but as owners of the property mortgaged. This was conceded before us in argument and is a fair inference from what is stated in the mortgage. Then the consideration for the mortgage was not an advance at the time but an antecedent liability of the first four defendants and the maturity of this is a matter of common and obvious comment. *Wool v Drummond* (1)

' But the matter does not rest there, because the recitals in the deed clearly indicate that the liability arose in connection with partnership transactions in which the first four defendants were jointly engaged. From the recitals it appears that the liability was in respect of bills drawn by the mortgagors Bombay firm on their Indore firm and the Bank's witness Chundul states in reference to the Indore firm that they used to draw hundies on themselves in Bombay under instructions from the head office of the Bank of Bombay. This point is not clearly made in the pleadings but the Bank's Counsel raised the issue, 'Whether the Bank of Bombay were not bona fide transferees for value of the property mentioned in the mortgage and it was apparently discussed before Chandavarkar J. as it certainly was before us, without any complaint that it was outside the legitimate scope of the suit.

On a consideration of all the materials in the case I hold that the Bank knew that the assets were applied to the private purposes of the executors and that treating the mortgage as I at present do as one by the first four defendants in exercise of their executory powers the Bank became a party to the devastation see *Hilson v Moore* (2). The result would be if things rested there that the plaintiffs as pecuniary legatees prejudiced by the mortgage could follow the assets into the hands of the Bank or its transferees.

' In coming to this conclusion I have not overlooked *Nigent v Gifford* (3) and *Mead v Lord Orrery* (4). But they cannot be regarded as authorities on the facts with which I have hitherto been dealing. Lord Brougham said of them in *Hilson v Moore* (2) 'It is impossible to read the argument of Lord Harlowe in each of these decisions without being satisfied that he considered the knowledge of the executors misappropriation is not distinctly brought home to the party. And in *Wool v Drummond* (5) Lord Eldon says that it is impossible to deny that Sir Thomas Sowell in effect, and Lord Kenyon in terms, shook the authority of *Nigent v Gifford* (3) and *Mead v Lord*

(1) (1809 10) 1 Ves. Jun. 152 at p. 15. (2) (1745) 3 Atk. 235.

(3) (1831) 1 Myl. & K. 337.

(4) (1831) 1 Myl. & K. 37 at p. 355.

(5) (1738) 1 Atk. 41.

(6) (1809 10) 17 Ves. Jun. 152 at p. 163.

*Oriery*(1), if those cases are supposed to establish doctrine so general as some of the dicta upon this subject import. But in the suggested explanation of these cases it has been pointed out that in *Augest v Gifford*(2) the executor was the sole residuary legatee, and in *Mead v Lord Oriery*(3) he was one of the residuary legatees. *McLeol v. Drummond*(4), though Mr Romer in his work on legacies maintains that this circumstance did not influence Lord Hardwick

"And this leads me to consider how far it makes a difference in the case that the first four defendants were universal legatees as well as executors. That this may in some respects alter the position is apparent from *Taylor v. Hawkins*(5), and *Graham v Drummond*(6).

'In *Graham v Drummond*(6) a second mortgage from an executor and residuary legatee was held to have a title which prevailed against creditors and Romer, J. (as he then was), in delivering judgment said 'I think it is settled law that, if an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existence of any unpaid debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator.' Later the learned Judge says 'The Chief reasons given are that unsatisfied creditors have no lien or charge on any asset, and that persons dealing with the executor in good faith are entitled to look to him alone, and are not bound to ascertain that all debts and liabilities have been discharged. For if they were so bound they would never be safe in dealing for valuable consideration with any asset, even though a considerable time might have elapsed since the testator's death (as happened in the case before me), and so a legatee whose legacy was assented to by the executor would be unfairly and unduly hampered in dealing with it. Further, the case of an executor who is a residuary legatee dealing with an asset is the same in principle as the case of a legatee who is not executor, but whose legacy has been assented to by the executor and who deals with his legacy for valuable consideration. In the last case unsatisfied creditors have the right to follow the legacy as against the legatee or volunteers claiming through him, but not as against purchasers from the legatee for valuable consideration.' But in *Graham v Drummond*(6) as in *Taylor v. Hawkins*(5) it was a creditor who sought to impugn the alienation. Here the plaintiffs are legatees.

'This is not a fanciful distinction. It is recognised in *Spence's Trustable Jurisdiction*, Vol II, p 374 where it is said 'A mortgage by an executor who is also residuary legatee to secure his private debt may be set aside even at the suit of a pecuniary legatee, for the nature of the claims of legatees, they taking under the will, may be ascertained, but as to creditors it is different, if

(1) (1715) 3 Atk 230.

(2) (1809 10) 17 Ves Jan. 152 at p 165.

(3) (1739) 1 Atk 103

(4) (1807) 8 Ves Jan 200

(5) [1806] 1 Ch, 463.

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a reasonable time has elapsed since the death of the testator, and then the executor deals with the residue as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid, or that there are other assets to payment of the debts if any, therefore the mortgagee would be safe as against creditors.

"If the view of Chandavarkar, J., is correct, there is a still further distinction, for he held that the legacy was charged on the property in suit, while the decision in *Graham v. Drummond*<sup>(1)</sup> proceeded on the ground that 'unsatisfied creditors have no lien or charge on any asset'. In support of this view Chandavarkar, J., relied not only on the language of the will as rendered in the translation before the Court, but also on the vernacular, which seemed to him to bring out the intention still more clearly.

"I have nothing to add to the reasoning of the learned Judge on this point, my only doubt has been whether it can be said that the charge is nugatory and inoperative, as adding nothing to the obligations that would exist without it (*cf. Scott v. Jones*<sup>(2)</sup>), *Freike v. Cranefeldt*<sup>(3)</sup>. But agreeing as I do with Chandavarkar, J. as to the effect of the will, I think there is a charge on specific property which has a legal operation (*cf. Girish Chunder Maiti v. Anundo Moji Debi*<sup>(4)</sup>). The testator in the first clause of the will enumerates the items of which his property at that time consisted and he therein mentions the property in suit. It is on the 'above mentioned goods and property' that the charge is imposed, and though in fact he died two days after the execution of the will he might have acquired other property, to which this express charge would not have applied.

"Had the Bank's advisers seen the will they would have learnt of the legacy and that it was charged on the property in suit. This must have led to the enquiry whether the legacy had been discharged and we must assume that an honest and not a false answer would have been given. In *re Morgan*<sup>(5)</sup> and *In re The Alms Cook Charity*<sup>(6)</sup>. That answer must have been that the legacy had not been satisfied, and if the Bank acted with knowledge of that fact, it would have held subject to the charge.

"I see no reason to suppose that the mortgagees would have met the enquiry with the answer that the Bank must be satisfied with the fact that the mortgagees were both executors and legatees of the property and must take that as evidence of assent, for even apart from the specific charge it would have been wrong on their part to have deprived the legatees of the right they had to have the property realized for payment of the legacy, and we ought not to presume that they would have done an act which would have been a breach of trust. *In re Queale's Estate*<sup>(7)</sup>

(1) [1896] 1 Ch. 903

(2) [1938] 1 Cl. &amp; F. 382

(3) [1935] 3 W. &amp; Cr. 100

(4) [1887] 13 Cal. 66 L.R. 14 I.A. 137

(5) [1851] 18 Ch. D. 93 at p. 107.

(6) [1901] 2 Ch. 750 at p. 762

(7) [1896] 17 Ir. L.L. Ch. D. 361 at p. 368

"The last cited case a decision of the Court of Appeal in Ireland, bears a striking resemblance to the present and there the Bank, a mortgagee by deposit of title deeds, was held to be postponed to a pecuniary legatee who had no specific charge.

No doubt the reliance is placed on the fact that the mortgage was only equitable but the cases seem to show that for the purposes in hand it makes no difference that the assignee or mortgagee does not obtain the legal estate in or legal control over the asset see *Graham v. Drummond*(1)

The question seems to hinge not so much on the character of the disposition as upon whether the circumstances justified the inference that the mortgagor was in possession as legatee and not as executor, and on this point the reasoning in the Irish decision is closely applicable to the facts of this case.

Mr. Roper in his work on Legacies at page 413 deals with a disposal of an asset by one in whom the double character of executor and legatee is combined, and after pointing out that as mere executor his disposal of assets to pay or secure his own debt would not prejudice individuals interested under the testator's will, he says, 'and as residuary legatee he could only dispose of what he was entitled to in that character, viz., what remained after all the trusts of the will were performed. It appears then that the accident of an executor being also residuary legatee cannot upon principle impart to him any larger authority over the assets than what he possessed by virtue of his office as executor.' No doubt the learned author does not here notice the implication of assent to which Pomeroy, J., alludes in *Graham v. Drummond*(2) but the passage shows what in his opinion the position would be apart from assent. Here there was no representation to the Bank that the mortgagors were legatees to whose legacy an assent had been given, the Bank had no knowledge and sought no knowledge as to the title, and as I have already said we ought not (in my opinion) to presume that the mortgagors would have made any representation involving a breach of trust.

"In Mr. Lewin's book on Trusts, pages 529, 530 of the 9th Edition, we have a conveyancer's view of the position.

"The whole doctrine which enables an executor legatee to dispose of a testator's assets to the detriment of claimants under the will is founded on convenience, but I cannot see in the circumstances of this case anything that requires us on that score to treat the Bank as alienees free from the legacy bequeathed by the will.

"It is true that in the cases there are expressions which point to fraud or collusion as being an essential element but this is not an exhaustive statement of the law. *Hill v. Simpson*(3) shows that gross negligence will suffice. There an executor and residuary legatee assented to his bankers certain stock

(1) [1896] 1 Ch. 968 at p. 975

(2) (1803) 7 Vet. Jnn. 152.



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as a security for his private debt and the Bank accepted without looking at the will his representation that he was residuary legatee subject only to a few small legacies. It was, however, held by Sir William Grant that the funds were liable to answer the demands of persons treated as being in the position of pecuniary legatees. The Master of the Rolls in the course of his judgment, remarked 'common prudence required that they should look at the will, and not take the debtor's word as to his right under it. If they neglect that and take the chance of his speaking the truth, they must incur the hazard of his falsehood. The rights of third persons must not be affected by their negligence. I do not impute to them direct fraud, but they acted rashly, incautiously and without the common attention used in the ordinary course of business, the reference in the will of Mrs. Smith to the will of her husband making it the same as if a legatee of her own was disappointed by this. It was gross negligence not to look at the will under which alone a title could be given to them. It was not necessary to use any exertion to obtain information which without extraordinary neglect they could not avoid receiving. No transaction with executors can be rendered unsafe by holding that assets transferred under such circumstances may be followed.' So here, I do not impute direct fraud to the Bank, but it certainly was guilty of gross negligence unless (as the circumstances suggest) the Bank was content to get what it could, and so that its conduct should be judged not by the standard of one exercising an unfettered choice, but of one seeking to secure a desperate debt as best he can.

'There is much in common between the facts of *Hill v. Simpson*<sup>(1)</sup> and those now under consideration the principal divergence being the difference in the time that elapsed between the coming into operation of the will and the impugned disposition. There is here we find a complete transfer by way of security while the present case is stronger in that there the claimant was treated as being in the position of a simple pecuniary legatee without a specific charge. No doubt here there is the difference that a considerable time had elapsed between the death of the testator and the mortgage in suit, but in the opinion of Chatterton, V C, 'the circumstance that there the transaction was very shortly after the death of the testator was not the only or even the main ground on which the Master of the Rolls grounded his decision' *Connolly v. Manser Deane*<sup>(2)</sup>.

'Moreover *In re Quile's Estate*<sup>(3)</sup> shows that lapse of time is not necessarily a bar, as here, possession is consistent with the purposes of the will, and in the argument before us no contention was based on the lapse of time as a bar to the suit or a circumstance affecting the rights of the parties.

"Hitherto I have dealt with the cases as though the Bank's claim rested on the mortgage of the 12th of January 1889, and on that alone and as a consequence that the charge was to secure an antecedent debt. But Mr Inverarity

(1) (1802) 7 Ves Jan 302.

(2) (1867) 1r. L. R. 19 Ch D. 110 at p. 127.

(3) (1883) 1r. L. R. 17 Ch D. 361.

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has sought to escape from this position and the inferences it involves, by suggesting that long before this there had been a mortgage by deposit of title deeds, therefore, he argues it cannot be said that the security originally was for an antecedent debt. But no reference is made to this in the Bank's written statement nor was any issue raised on the point. The evidence as to the deposit is of the vague description and leaves it absolutely uncertain what was the liability in respect of which the deposit was made. There certainly is no ground to assume that the documents of title were deposited to secure a contemporaneous advance for the deposit alleged is said to have been made in 1890 while the evidence of the 1st defendant is that his firm began to get credit from the Bank of Bombay about a year or a year and a half after his father's death, i. e., in 1894 or 1895 and this is confirmed by Ex. A 4.

"I must not omit to notice the learned Judge's determination that clause 10 of the will does not forward the Bank's claim. Apparently it was never suggested until the plaintiff's reply that the clause had any bearing on the case and then the suggestion proceeded from the learned Judge who on further reflection decided not to hear the plaintiffs' Counsel on the point, having regard to the admitted facts of the case and the terms of the will. It is admitted that the testator carried on a business in his lifetime and that the business of the partnership in respect of which the indebtedness was incurred was in no sense a continuance of it, and it is manifest that the Bank was not misled or influenced by the presence of this clause. In the circumstances therefore I am of opinion that the Bank's position is in no way bettered by clause 10 of the will.

"I see that in the course of his judgment it is said by Chandavarkar, J., that 'It cannot be that Laker and plaintiff No. 1 were unaware of the fact that defendants 1 to 4 had deposited their deeds with the Bank and were contracting debts.' If by that is meant that Laker and plaintiff No. 1 knowingly stood by and permitted defendants 1 to 4 to deal with the Bank as if they were the absolute owners of the mortgaged property, it so far as these two were concerned might have made a material difference in their rights. But no plea to this effect is to be found in the pleadings nor is the point raised in the issues, not a word in support of this view was urged in the course of the argument before us and I cannot find any real foundation for it in the evidence. The first plaintiff distinctly says that the first intimation he had of the mortgage was in June 1903. I think therefore the suggestion of the learned Judge can be no more than mere speculation and impression and therefore not a legitimate basis for legal decision.

"The conclusion therefore to which I have come on this part of the case is that the plaintiffs' claim must prevail over the mortgage to the Bank and the title of its transferee."

The appellate Court dismissed the appeal of the first four defendants and overruled the objections taken by the Bank and Dwaidkars Dharamsey, and concluded—

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" We must declare that the undivided moiety of the house in Bhaji Pahi Street, and the property in Falkland Road left by the will of Kheja Somji Parpia, deceased, form part of the estate of the testator and areas such available for the payment of the plaintiffs legacy in priority to the claim thereon of the Bank as mortgagee of the same and of its transferee the defendant Dwarkadas Dharamsey

" The decree must therefore contain a declaration to the above effect "

On this appeal *Sir R. Finlay, K C*, *Leidl, K C*, and *Frank Russell, K C*, for the appellants contended that under their mortgage the Bank of Bombay had a complete title to the property mortgaged and not subject to any charge created by the will of Somji Parpia. The mortgage had been executed in good faith and for valuable consideration by the executors of the will who were also residuary legatees, and the Bank was fully justified in believing that then mortgagors were competent to give them a good title. Under the law of India the executors had full power to dispose as they thought fit of all property movable or immovable vested in them as executors. The Probate and Administration Act (V of 1881), sections 4, 90, 113, 115, 116, and the Amending Act (IV of 1889), section 14, were referred to. The Bank had no notice, actual or constructive, of the existence of any charge on the property in priority to their mortgage. Under those circumstances, and considering that the Bank had no notice of any other ground which rendered it improper for the executors to deal with the property under the will as the mortgagors had done, the Bank's mortgage was, it was submitted, valid against any unsatisfied creditors of the testator. Reference was made to *Graham v Drummond*<sup>(1)</sup>, *In re Whistler*<sup>(2)</sup>, *Colyer v Finch*<sup>(3)</sup>, and *In re Venn and Furse's Contract*<sup>(4)</sup>. The two last cited cases showed that the fact that the mortgage purported to secure a debt due from the mortgagors personally was immaterial and did not affect the title of the mortgagee. But even assuming that the Bank had constructive notice of the will, the fact that the mortgage was executed 11 years after the death of the testator entitled the Bank to assume that at the time of its execution the legacy now said to be a charge on the property

(1) [1895] 1 Ch D 51 at pp. 97-1-97-4

(2) [1897] 35 Ch D 561

(3) [1895] 5 H L C 905

(4) [1891] 2 Ch 101 (111-114)

mortgaged had been paid, especially as by the terms of the will it was payable within 6 years after the testator's death, and it was not necessary for the Bank to inquire whether it had been paid or not. Reference was made to *In re Queale's Estate* (1) relied upon by the Appellate Court in India which it was contended was distinguished from the present case by the length of time that had elapsed between Somji Parpia's death and the execution of the mortgage, and by the fact that in the case in Ireland the mortgage was merely an equitable one. Lewin on Trusts 11th Ed., page 557, was also referred to. The executors had full power to pledge the assets of the testator's estate, and no concurrence or assent of the plaintiffs was necessary to free the mortgage, at its execution, from the charge if any, created by the will.

*Danckwerts, K. C.*, and *P. S. Stokes* for the plaintiff respondents contended that the Appeal Court in India had rightly held that the mortgage to the Bank was subject to the charge in favour of the plaintiffs under the will of Somji Parpia. Some facts had been concurrently found by both the Courts in India, one of which was that the Bank had constructive notice of the charge created by the will on the estate, and the rights of the plaintiffs under it. That being so, and the defect in the title of the executors and mortgagors to mortgage the property appearing on the face of the documents of title deposited with the Bank, the latter were thereby put upon inquiry and were guilty of negligence in not calling for and investigating the title of the mortgagors to the property comprised in the mortgage, and must be held to have taken the mortgage subject to the charge on it created by the will. Reference was made to *Agra Bank, Limited, v. Barry* (2), *Corser v. Cartwright* (3), as to constructive notice through Solicitors, the latter case showing that the plea that the mortgage was for value without notice was no protection where the Bank might have had notice by using due diligence in investigating the title, *Jackson v. Rowe* (4), *Jones v. Smith* (5), *Patman v. Harland* (6), where an express representation by the vendor that a deed

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(1) (1876) Ir. L. R. 17 Ch. D. 361

2 (1874) L. R. 7 H. L. 135 (187)

(7) (1875) L. R. 7 H. L. 731

4 (1876) 2 Sim. &amp; Stu. 472

(5) (1841) 1 Haro. 43 1 Phill. ps. 44

(6) (1883) 17 Ch. D. 303

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did not affect his title was held not to protect a mortgagee or purchaser who had not looked at the deed, *Wilson v Hart*<sup>(1)</sup>, and *In re Whistler*<sup>(2)</sup>

Another fact concurrently found by the Courts below was that the mortgage was executed on account of money borrowed to pay pre existing debts of the mortgagors, it was therefore not in respect of matters or transactions or for purposes authorised by the will, and the Appellate Court in India found that the money had been in fact applied to the private purposes of the executors and mortgagors. As to this it was contended that for such purposes the mortgagors had no power to pledge the assets of the testator to the prejudice of any charge the plaintiffs had under the will, and that the fact that they were also residuary legatees could not give them any larger authority over the assets than they had as executors their power as residuary legatees being limited to disposing of what they were entitled to in that capacity after all the trusts of the will had been performed, that in short, the Bank could not acquire from their mortgagors any greater interest than those mortgagors themselves had in the property under the will. Reference was made to Roper on Legacies page 443 and on the construction of the will *In re Kirk*<sup>(3)</sup> and *Wigg v Wigg*<sup>(4)</sup> were cited.

As to the powers of an executor under the will of a Mahomedan the case of *Shah Moosa v Shah Ussa*<sup>(5)</sup> was cited, and the Succession Act (X of 1865), section 271, and the Probate and Administration Act (V of 1881), sections 2, 4, 5 12 and 90, were referred to.

As to the advantages to the plaintiffs of their being not merely creditors, but legatees with a specific charge on the testator's estate the arguments and authorities cited in the judgment of the High Court on appeal were adopted, and that judgment, it was submitted, should be affirmed.

(1) (1860) L. R. 1 Ch. 463 (466 467)

(2) (1882) 21 Ch. D. 431 (437)

(3) (1887) 35 Ch. D. 561

(4) (1733) 1 Atk. 383

(5) (1856) 8 Bom. 211

*Lerc't, K. C.*, replied, referring to *Graham v Drummond*<sup>(1)</sup>, *Mead v Lord Orrery*<sup>(2)</sup>, and *Taylor v. Hawkins* [*Danckwerts, K. C.*, with reference to the two last named cases cited *In re Morgan*<sup>(3)</sup>, and *In re The Alms Corn Charity*<sup>(4)</sup>]

1903, July 21st —The judgment of their Lordships was delivered by—

SIR ANDREW SCOBLE —The facts relating to this appeal are not in dispute, and may be shortly stated

Somji Parpia died on the 15th February 1885. He left eight sons, four by his first wife (hereafter called the elder sons) and four (hereafter called the younger sons) by his second wife Lahai, who also survived him. By his will, he left all his property to his elder sons, subject to a charge of Rs 50,000 in favour of his widow Lahai and his younger sons. Both Courts in India have found that this legacy was charged upon the property in suit, and their Lordships agree with this decision.

After their father's death, the elder sons entered upon large business transactions, under the style of Somji Parpia & Co., and in the course of their business became indebted to the Bank of Bombay in respect of advances on bills drawn by the firm in Bombay upon a branch of the firm at Indore. To secure these advances, the elder sons, on the 1st September 1890, deposited certain title deeds relating to the property in suit, by way of equitable mortgage, with the Bank, and on the 12th of January 1899 the Bank obtained from them a formal mortgage of the same property, to secure the repayment of Rs 52,000 in respect of bills then due or to become due drawn by the firm on their Indore branch. It is not disputed that this debt was a debt of the four elder sons in respect of their own business, and that the legacy to the widow and the younger sons was at the time and still is, unsatisfied.

The property comprised in the mortgage consisted of a house in Bhaji Pala Street and a piece of land in the Falkland Road, in the City of Bombay, to both of which the mortgagors declared themselves to be entitled but both of which had been specified

(1) [1806] 1 Ch 938 (974).

(2) (1803) 3 Ves Jan 209.

(3) (1745) 3 Atk 236 (241)

(4) (1881) 18 Ch D 93 (103)

(5) [1901] 2 Ch 750 (762)

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by their father Somji Parpia, in his will as subject to the charge of Rs 30 000 in favour of his widow and younger sons. This will was not among the documents of title deposited with the Bank, but the root of the title to the house in Bhaji lala Street the more valuable of the two properties, was indicated in the will of Meenabai, widow of Somji Parpia's father Dhunji Parpia, which was deposited. From this it appeared that the house had been the joint property of the two brothers, and if the Bank's legal advisers had made any investigation of title, they must have enquired how Somji's share had come to the mortgagors, and in this way obtained cognizance of his will, and of the charge on this portion of his estate. But they made no enquiry, and appear to have assumed that the mortgagors were the absolute owners of the property mortgaged. It is not suggested that the mortgagors practised any concealment of the real facts of the case, and if they had been asked about their father's will, it is to be presumed that they would have given an honest answer.

Nor is it suggested that the younger sons had any knowledge of the dealings of their elders with the Bank. But when the Bank advertised the properties for sale they filed this suit in order to establish the priority of their charge over the mortgage to the Bank. And the only question in this appeal is whether they are entitled to such priority.

Mr Levett, in his able argument for the appellants contended that, under the will of Somji Parpia the mortgagors were residuary legatees as well as executors, and he relied upon a passage in the judgment of Romer, J. in *Graham v Drummond*<sup>(1)</sup> in which that learned Judge says (at p 974) —

"I think it is settled law that if an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset that person's purchase or mortgage is valid against any unsatisfied creditor of the testator.

But this does not dispose of the present case. Here the plaintiffs are legatees, and the distinction between creditors and

legatees is well pointed out in Spence's 'Equitable Jurisdiction,' Vol. II, p. 376, where it is said —

'A mortgage by an executor, who is also a legatee to secure his private debt, may be set aside even at the suit of a pecuniary legatee for the fulfilment of the claims of legatee, they taking under the will may be ascertained but as to creditors it is different if a reasonable time has elapsed since the death of the testator and then the executor deals with the residue as his own the jurist may, in the absence of notice to the contrary assume that the debts have been paid or that there are other assets for payment of the debts if any therefore the mortgagee would be safe as against creditors

Moreover, in this case, the mortgagee had constructive notice, and has only himself to thank if his position is not safe, for had he taken the slightest pains to investigate the title of the mortgagors he must certainly have discovered the charge created by the will of Sonji in favour of the widow and her sons

It was also contended that by the terms of the will the legacy was to be made up and paid within six years after the testator's decease, that this period would have expired in 1891, eight years before the date of the mortgage, and that, assuming notice of the will on the part of the Bank the Bank was entitled to assume that the executors were acting with the consent of the legatees. Lapse of time is, no doubt, a circumstance that may be taken into consideration in cases of this kind, but having regard to the fact that, in this case, two of the younger sons were still minors when the title-deeds were deposited with the Bank, and that continued possession by the elder sons was not inconsistent with the purposes of the will their Lordships agree with the Court below in holding the rights of the parties unaffected by this circumstance

The case of *In re Quales Estates Ltd.*<sup>(1)</sup> bears a strong resemblance, in its facts, to that now under consideration. There the testator's son deposited with a Bank three leases to secure his own overdrawn account. The Bank dealt with him as absolute owner and eventually proceeded to sell the leaseholds, whereupon the testator's daughters claimed to be placed on the schedule as encumbrancers in respect of unpaid legacies, and their claim was allowed. In delivering judgment, FitzGibbon, L. J., says —



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' The Bank dealt with him (the mortgagor) as, and in his capacity of, an individual owner—not an executor, but a person pledging his own property for his own debt, giving as security his own interest for his own purposes. Under such circumstances the Bank can, in my opinion, have no better title than that which its creditor really had in the capacity in which he was dealt with, namely, as beneficial owner, i.e., as residuary legatee.'

Their Lordships agree with the learned Judges of the High Court of Bombay that the claim of the first four respondents (the younger sons of Somji Parpin) must prevail over the mortgage to the Bank and the title of its transferee, Dwarikadas Dharamsy, and they will humbly advise His Majesty that this appeal should be dismissed, and the decree of the High Court of the 14th April 1905 confirmed. The appellants must pay the costs of the appeal.

*Appeal dismissed.*

Solicitors for the appellants — *Cameron Kemm & Co.*

Solicitors for the respondents — *Raele Johnstone & Co.*

J. V. W.

## CRIMINAL REFERENCE

*Before Mr. Justice Chandavarkar and Mr. Justice Aston*

EMPEROR v. DHONDU BHA KRISHNA KAMBLYA \*

1931

*February 4*

*Workman's Breach of Contract Act (XIII of 1859) sections 1, 2—Summary inquiry into an offence punishable under the Workman's Breach of Contract Act—Court Fees Act (VII of 1870) section 31—Court fee on petition of complaint—Liability of the workman to pay.*

An offence under the Workman's Breach of Contract Act (XIII of 1859) cannot be tried summarily. A penal enactment must be construed strictly. The proceedings of the Magistrate under the Act, up to and inclusive of the passing by him of an order for either the repayment of the advance or performance of the contract do not constitute a trial for any offence as defined in the Criminal Procedure Code.

In a proceeding under the Workman's Compensation Act where the workman admits the advance and repays the same it is not competent to the Magistrate to make him pay to the complainant the Court fee paid on the petition of complaint.

\* Criminal Reference No. 142 of 1903.

THIS was a reference made by Mr. J K Kabiraj, District Magistrate of Ratnagiri.

The reference was in the following terms —

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1 In this case the complainant Gharu Pama Pilankar complained that the accused Dhondubhai Krishnarao Amblya having agreed to serve as a khalashi on the complainant's ship on condition of his paying him Rs. 25 in addition to food for a season of 7 months, received Rs. 3 in advance, that it was agreed two rupees more would be given to the accused at the time of sailing, that the accused wanted the balance earlier which the complainant refused to pay however the complainant paid him two annas in the interval, that the accused worked for 3 days on the ship and left the service and thus committed a breach of contract of service punishable under section 2 of Act XIII of 1859. The accused also admitted these allegations and stated that in consequence of the ill treatment by the captain of the ship employed by the complainant he left the service. The Magistrate held the accused liable for the breach of the contract.

2 The accused was summarily tried and convicted of the breach under section 2 of Act XIII of 1859 and ordered by Mr. A R Chitambar Magistrate First Class, Patungiri to pay the complainant Rs. 3 and annas 2 advanced by him in addition to Rs. 1.10 on account of the expenses incurred in the prosecution by the complainant.

3 The order awarding the expenses in the prosecution made presumably under section 31 of the Court Fees Act as well as the conviction are considered illegal and are recommended to be quashed and the whole amount awarded to be ordered to be repaid.

4 The conviction is considered illegal inasmuch as the case cannot be tried summarily, and enquiry to be made under section 2 of Act XIII of 1859 not bringing an enquiry into an offence which may be tried summarily (I L R 1 Mad 234). The order about the payment of compensation is considered wrong on the ground that according to section 2 of the Act the Magistrate is to order only the repayment of the money advanced or such part thereof as may seem to the Magistrate just and proper (High Court Puling 2 of 1891). Further according to the same section the workman must be shown to have wilfully and without lawful and reasonable excuse neglected or refused to perform the work contracted but from the papers of the case it does not appear that the Magistrate has found this to be so.

The reference came up for disposal before Chundavarkar and Aston, JJ.

*PER CURIAM* — The question whether an offence under Act XIII of 1859 can be tried summarily has been answered in the affirmative by the Madras High Court in *In re Higgins* (Went's Criminal Rulings, p. 466) and by the Allahabad High Court in

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*Queen Empress v Indaryit* <sup>(1)</sup> and in the negative by the former Court in another case, *Pollard v Mithal* <sup>(2)</sup>. We prefer to follow the ruling last cited. A penal enactment must be construed strictly and it appears to us that under Act XIII of 1859, sections 1 and 2, the proceedings of the Magistrate up to and inclusive of the passing by him of an order for either the repayment of the advance or performance of the contract do not constitute a trial for any "offence" as defined in the Criminal Procedure Code. Where there has been a wilful neglect or refusal on the part of a person to perform his part of the contract, the Statute enables the Magistrate to give at the option of the complainant to such person a *locus penitentiae* by ordering him either to return the advance or perform the contract. If he obeys the order, he commits no offence. It is only when the order has been disobeyed that there is "an act or omission, made punishable" by the law and falling within the definition of "offence" in the Criminal Procedure Code. The Magistrate has only then jurisdiction to deal with the disobedience of his order and sentence the person who has disobeyed to imprisonment.

There is no doubt this to be said for the contrary view that, having regard to the recital in the preamble that 'it is just and proper that persons guilty of such fraudulent breach of contract should be subject to punishment' and to the provisions of section 1 enabling the party aggrieved by such breach to make a complaint to a Magistrate and the Magistrate to issue a summons or warrant, it was the intention of the Legislature to treat such fraudulent breaches as "offences," and that though the punishment provided is only for disobedience of the Magistrate's order, yet it is in reality punishment for the fraudulent breach. This view of the Act has been suggested in *Queen-Empress v Kallayan* <sup>(3)</sup>. There is no express decision of this Court on the point, but had that been the intention of the Legislature they would have said that the punishment provided was for the fraudulent breach itself not for disobedience of the order of the Magistrate.

(1) (1859) 11 All 252

(2) (1851) 1 M.L. 231

(3) (1897) 20 M.L. 235

The order of the Magistrate awarding the expenses of the prosecution is illegal (see *Imperatrix v. Budhu Devu*)<sup>(1)</sup>. As was held there, the repayment to the complainant of the Court fee paid on his petition of complaint could only be ordered "in addition to the penalty imposed" upon the person complained against and no penalty could be imposed till the person complained against had disobeyed the order for the payment of the sum advanced to him.

As the person complained against admitted the advance made to him and agreed to repay it and has repaid it, no prejudice can be said to have been caused to him by the summary trial held by the Magistrate and we decline to interfere with that part of the order which directed repayment. But we set aside the order as to Rs 1-1-0 and direct that the complainant do refund it to Dhondubin Krishna Kamblyia.

R R

(1) (1901) Cri Pal No 2 Unrep Cri Cas, 531

## CRIMINAL REFERENCE

*Before Mr Justice Chaudavarkar and Mr Justice Heaton*

EMPEROR v BALU SALUJI \*

*Workman's Breach of Contract Act (XIII of 1859)—Inquiry under the Act—Summary trial not permissible*

1938  
October 13

An offence under the Workman's Breach of Contract Act 1859 cannot be tried summarily.

*Emperor v Dhondubin Krishna*<sup>(1)</sup>, followed.

This was a reference made by F. J. Varley, Acting Sessions Judge of Ahmednagar.

The reference was in the following terms —

2 (i) The facts out of which this reference arose are that the accused Balu Saluji passed a *not to namaz* to do certain weaving work in consideration of a sum of Rs 99 which he wilfully and without lawful excuse failed to perform.

(ii) Mr R B Phansalkar Magistrate First Class, Sangamner, who tried the case under Act XIII of 1859 directed the accused under section 2 to repay

\* Criminal Reference No 9, of 1938

(1) (1901) ante p 22 6 Bom L R 250.

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Rs 99 to the complainant within 15 days. The accused having failed to comply with the order has been sentenced by the said Magistrate to two months' rigorous imprisonment or until such sum has been sooner paid.

(iii) Summary nature of the trial.

(iv) Reasons. It has been laid down in *Emperor v. Diondu* reported at 6 Bom L R 235, that offences under Act XIII of 1859 are not triable summarily. The practice of the Magistrates in this district varies considerably. At the time when the reported reference was made, the contrary view was not pressed upon the attention of their Lordships who heard the reference. They say "We prefer to follow I L R 4 Mal 234," while saying "there is no doubt this to be said for the contrary view" . . . that the preamble seems to prescribe punishment for fraudulent breach of contract.

The District Magistrate has appeared through the Public Prosecutor and adduced the following considerations for the contrary view —

(i) The word "complaint" is used in section 1, and complaint is defined in section 4, Criminal Procedure Code, as 'an allegation made to a Magistrate with a view to his taking action under the Criminal Procedure Code. Had the breach been merely disobedience of the Magistrate's preliminary order the word "application" would have been used.

(ii) It is the practice of some Magistrates to pass preliminary order while some make the order and penalty on failure to comply in one and the same order. The latter seems to be justified by the fact that the wording of section 2 is not disjunctive. 'And if . . .

3 The following considerations appear also to the Court to have weight

(i) The penalty is 3 months' imprisonment and this is within the limit of summary jurisdiction.

(ii) The order is conditional 'or until such sum of money be sooner paid,' so the workman is not prejudiced.

(iii) Summary jurisdiction is exercised by Magistrates of experience, and they only take action under Act XIII of 1859 when the case is a clear one. If a regular procedure be prescribed the object of the Act will be largely defeated, for an element of delay will be introduced, and the remedy of masters and employers will be as speedily obtained through the Civil Courts though the Act was designedly framed to avoid the necessity of resorting to the Civil Courts.

4 The necessity for making this reference arises as it is desirable to have the point cleared up definitely whether cases under the Act XIII of 1859 can be legally tried in a summary manner or not.

The reference was heard by Chhandavarkar and Henton, JJ

M. B. Chaudal, Government Pleader, for the Crown.

*PER CURIAM*—The law enunciated in *Emperor v. Dhondu*<sup>(1)</sup> ought, we think, to be followed. It is in accordance with the rule of construction applicable to an Act, such as Act XIII of 1859. That rule is well explained by Lord Herschell in *Derby Corporation v. Derbyshire County Council*<sup>(2)</sup>. The action there was a proceeding in the County Court under the 10th section of the Rivers Pollution Act, 1876, under which a County Court Judge had power to order any person to abstain from polluting a river and the said person might be required to perform that duty in the manner specified in the order. If the order were disobeyed, the County Court Judge had jurisdiction to impose a penalty not exceeding £50 a day, as he should think reasonable.

As Lord Herschell says in his judgment, the proceeding in which the County Court Judge orders any person to abstain from polluting the river and requires him to perform that duty in a specified manner is not a penal proceeding, because "all it can end in is an order under such terms and conditions as the County Court Judge thinks reasonable to prevent or abate a nuisance." Then his Lordship goes on "The Legislature has provided that if that order is disobeyed then the County Court Judge may impose a penalty . . . That is a separate and independent proceeding. It is true it is taken, as it is said, in the action or the proceeding, but it is really a separate proceeding in which the penalty for disobedience is imposed".

This Court, therefore, quashes the orders in this case. The lower Court will be at liberty to take fresh proceedings according to law.

*Order set aside.*

R F

(1) (1904) ante p. 22; G. Lom. L. R. 255

(2) [1897] A. C. 550

## APPELLATE CIVIL

*Before Mr Justice Bateelor and Mr Justice Chaudh.*

1908.  
July 1.  
THE TRUSTEES FOR THE IMPROVEMENT OF THE CITY OF BOMBAY,  
APPELLANTS, v. KARSANDAS NATHU AND OTHERS, RESPONDENTS \*

*Compulsory acquisition of land—Compensation—Method of hypothetical development for fixing value of land to be acquired—Charges as to the costs of the speculator—Compensation based on sales of lands into suitable building sites—The two methods employed in conjunction and producing the same result*

The method of hypothetical development is open to the objection that it involves or presupposes the intermediation of a third person called the speculator or exploiter, that is to say, a person who purchases the land wholesale from the claimant in order afterwards to sell it retail for building purposes

The value of the land to the owner is what must be regarded, and that is the price which it will fetch if disposed of on most profitable terms. The owner is not to be deprived of the most advantageous way of selling his land by reason of the fact that it is subject to immediate acquisition. If the sale of the land in building sites is impossible except through the speculator, then, no doubt, allowance will have to be made for the profits costs and other charges of the speculator. But the claimant is not to be debited with these expenses unless the introduction of the speculator is a commercial necessity. And there is no necessary reason why the claimant should be driven to have recourse to the speculator for a business which he can do for himself.

When compensation is fixed on the general principle of a sale of the land split up into parcels suitable for building it is not only necessary but inappropriate to make a special deduction on account of the small area marked off for the roadway.

Where the method of hypothetical development is employed for ascertaining compensation in conjunction with the method of ascertaining the present value of the land by reference to the prices realised by the sale of neighbouring lands, and the consequence is that the two methods tend to very much the same result, it follows not only that that result is entitled to so much the greater degree of confidence but also that the method of hypothetical development is itself corroborated.

In the method of arriving at a valuation of land by reference to prices realised by sales of neighbouring lands, it is plain that no evidence of former sales can be obtained which shall be precisely parallel in all its circumstances to the sale of the particular land in question. Differences small or great exist in

it is a condition, and that provision should be made for these differences is not a matter which can be reduced to any hard and fast rule

APPEAL from the decision of the Tribunal of Appeal constituted by the City of Bombay Improvement Act (Bombay Act IV of 1898)

The facts are set forth in the judgment

*Robertson and Jardine* (with *Crawford Brown & Co*) for the appellants

*Incorporate Saltral and Jinnah* (with *Nann & Co*) for the respondents

BACHELOR J —This is an appeal by the Trustees for the Improvement of the City of Bombay against an award of the Tribunal of Appeal appointed under section 48 (3) of Bombay Act IV of 1898

The area of the land taken up is 5,576 square yards and the Special Collector awarded a total sum of Rs 65,511 2-0 On reference to the Tribunal, the Tribunal has increased that award to a total sum of Rs 87,798 This works out to an average of Rs 15 11 0 per square yard according to the present appellants, and to a few annas less according to the respondents With this small difference we are not further concerned, and the real question before us—when all is said and done—amounts to this Is the allowance of Rs 15-11-0 per square yard shown to be excessive?

Apart from the general principle which restrains a Court of civil appeal from interfering with any decree unless it is satisfied that that decree is wrong we have here two special considerations which should deter us from lightly disturbing the award under appeal One of these considerations is that the matter in dispute is one where absolute precision or mathematical accuracy is not attainable, and the other consideration is that the Tribunal of Appeal has acquired long and valuable experience in these matters of valuation, with which alone the present controversy is concerned. Upon this point we follow the principle enunciated by Sir Lawrence Jenkins in *Anand Rao Venayak v. Secretary of*

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*State.*<sup>(1)</sup> And the result is that before interfering with the award, we must be clearly satisfied that it is substantially erroneous.

Now the Tribunal has grounded its decision largely upon the footing that the land under acquisition is conceived to have been laid out in small plots for building purposes, inasmuch as that admittedly is here and now the most profitable method for the disposal of such property as this. It was admitted before the Tribunal that the land should be valued as laid out for building purposes in these small plots, and should not be valued merely as one integral parcel of land.

The method adopted by the Tribunal has been described as the method of hypothetical development. And for the purposes of this case, we will adopt that description without pausing to investigate its accuracy. Now the objection offered to this method is—as we understand it—that it involves or presupposes the intermediation of a third person whom you may call the speculator or exploiter, that is to say, a person who purchases this land wholesale from the claimant in order afterwards to sell it retail for building purposes.

The whole case of the appellants, as it seems to us, depends upon this presupposition being made good; and in our opinion it is not made good. The value of the land to the owner is what must be regarded, and that is the price which it will fetch if disposed of on the most profitable terms. There is no doubt that here, as we have said, the most profitable method of disposing of it is to lay it out in small parcels for building sites. And the owner, it seems to us, is not to be deprived of the most advantageous way of selling his land by reason of the fact that it is subject to immediate acquisition. If the sale of the land in building sites is impossible except through the speculator, then no doubt allowance will have to be made for the profits, costs and other charges of the speculator. But the claimant is not to be debited with these expenses unless the introduction of the speculator is a commercial necessity. And for our own part we can see no necessary reason why the claimant should be

(1) (1903) 29 Bom. 563.

driven to have recourse to the speculator for a business which he could do for himself.

It is true of course that, on the case we are now putting, we are assuming a sale which could not be completed in a day. But the Tribunal of Appeal has made ample allowance for this consideration and has reckoned a period of two years as the period which would be required for the completion of the sale. Upon this footing it has written back the total sum for one year at 6 per cent which seems to us to give an adequate provision for the period over which the realisation of income will be spread.

When this deduction is made, we are of opinion that the resulting figure does give us the present market value of the land of the claimant, subject of course to such minor expenses as would be incurred by advertising, planmaking, etc., for which Rs. 500 have been allowed by the Tribunal.

Complaint was made that no separate allowance or deduction had been made on account of the passage or roadway shown in the plan. But if we are right in the foregoing observations upon the general principle adopted by the Tribunal, we do not think that this particular argument of the appellants has any weight, for when once you have adopted the general principle of a sale of the land split up into parcels suitable for building, it appears not only unnecessary but inappropriate to make a special deduction on account of the small area marked off for the roadway. For the Tribunal has found that the whole site is worth to the claimant Rs. 15 11 0 per square yard over all, and in that whole site is included the area set aside for the roadway. The evidence shows not only that this point was not overlooked by the Tribunal, but also that it is not unusual for the purchaser of a plot adjoining the roadway to pay for half the roadway, as well as for the site actually available for building.

So much then as to this special method of valuation which the Tribunal in this instance has invoked for its assistance. But it is important to observe that the Tribunal has not relied exclusively upon this method. It has employed this method in conjunction with the method of ascertaining the present value of the land by reference to the prices realised by the sale of neigh-

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bouring lands And since the consequence is that these two methods lead to very much the same result, it follows not only that that result is entitled to so much the greater degree of confidence, but also that the method of hypothetical development is itself corroborated

We have looked into the evidence as to sales of neighbouring lands, and we have considered the arguments addressed to us on this point by Counsel, but it is not, we think, necessary to examine that evidence again in detail It is plain that no evidence of former sales can be obtained which shall be precisely parallel in all its circumstances to the sale of this land in reference Differences small or great exist in various conditions, and what precise allowance should be made for these differences is not a matter which can be reduced to any hard and fast law It will suffice, therefore, for us to say that upon a general consideration of all the circumstances which have been adduced, we are of opinion that the neighbouring sales afford ample support for the view which the Tribunal ultimately took.

Only one point remains to be noticed and that is as to the allowance of Rs 1,330 for damages under—as the judgment goes—sub section 3 of section 23 of the Land Acquisition Act After reference to the President of the Tribunal and upon consideration of the general language of the judgment we are satisfied that subsection 3 was misquoted for subsection 4 and that the damages given were given not on account of severance as such, but by reason of the acquisition having injuriously affected the claimant's other property Of this injury there is we think sufficient evidence in the deposition of witness Raghunath and in the map itself, Exhibit Q And nothing has been said which would justify us in reducing the sum which the Tribunal has awarded up on this head

The result therefore is that this appeal must be dismissed with costs

*Appeal dismissed*

## CRIMINAL REVISION.

*Before Chief Justice Scott and Mr Justice Knight.*

EMPEROR v BHAUSING DHUMALSING \*

1908.

July 7.

*Criminal Procedure Code (Act V of 1898), sec 106 (3)—Order to furnish security—Order can be passed by the appeal Court—Jurisdiction of the appeal Court.*

Section 106 clause 3, of the Criminal Procedure Code (Act V of 1898) makes it clear that the order for security may be made in appeal whether the original Court had jurisdiction to pass such an order or not. The word "also" in the clause plainly implies that the order may be independently made by those Courts as well as by the original Courts in the first clause, and it is neither suggested nor implied that the powers of the original Court should in any way control or limit those of the appellate or revisional authority.

*Mahmudi Sheikh v Aji Sheikh* (1) *Muttiah Chetty v Emperor* (2) and *Paramasiva Pillai v Emperor* (3), dissented from.

*Dorazam Aaidu v Emperor* (4), referred to with approval.

THIS was an application for revision under section 435 of the Criminal Procedure Code (Act V of 1898), from an order passed by E G Turner, Magistrate, First Class, of Yeola.

The accused with eight others was tried by the Second Class Magistrate of Yeola for rioting and causing hurt, offences punishable under sections 147, 323 and 325 of the Indian Penal Code (Act XLV of 1860). The Magistrate convicted the accused of offences under sections 174 and 323, and sentenced him to undergo simple imprisonment for 15 days.

On appeal, the First Class Magistrate of Yeola altered the conviction to one under section 323 of the Indian Penal Code, reduced the sentence to simple imprisonment for five days, and ordered the accused under section 106 of the Criminal Procedure Code (Act V of 1898) to execute a bond of Rs 100 with one surety in like amount to keep the peace for one year.

The accused applied to the High Court.

*M. V Bhat*, for the applicant.

\* Criminal Application for Revision No 84 of 1908.

(1) (1894) 21 Cal G 7.

(2) (1900) 20 Mad 48.

(3) (1905) 29 Mad. 190.

(4) (1905) 29 Mad. 182.

1908

EMPEROR  
v  
BHATSING

The Government Pleader for the Crown.

SCOTT, C J —The petitioner, with eight other persons, was charged with rioting and causing hurt to the complainant under sections 147, 323 and 325 of the Indian Penal Code, in the Court of the Second Class Magistrate of Yeola, and was convicted under sections 147 and 325 of the Code and sentenced to simple imprisonment for fifteen days.

The petitioner then appealed to the First Class Magistrate, who altered the conviction to one under section 323 and reduced the sentence to five days' simple imprisonment and under section 106 of the Criminal Procedure Code directed that the appellant should execute a bond of Rs 100 to keep the peace for one year.

The petitioner now applies to us in revision to set aside the order for execution of a bond contending that the Court had no jurisdiction to add such an order to the sentence of the Second Class Magistrate.

We cannot accept that contention. Section 106 of the Criminal Procedure Code authorises such an order whenever any person is convicted of an assault by the Court of a Magistrate of the First Class and such Court is of opinion that it is necessary to require the execution of such a bond. Both conditions are fulfilled in the present case for the order of conviction under section 323 was passed by the First Class Magistrate and his opinion was that the bond was necessary.

It has however been contended that such an order cannot be made in appeal and in support of that contention the following cases have been cited *Mahmud Sheikh v. Aji Sheikh*<sup>(1)</sup>, *Muthiah Chetty v. Emperor*<sup>(2)</sup> and *Paramasiva Pillai v. Emperor*<sup>(3)</sup>.

We are not prepared to accept the construction placed upon section 106 in those cases. We think that clause 3 makes it clear that the order for security may be made in appeal whether the original Court had jurisdiction to pass such an order or not. The clause runs — "An order under this section may also be

(1) (1901) 21 Cal 60.

(2) (1905) 29 Mal 100.

(3) (1906) 30 Mal 18.

made by an appellate Court or by the High Court when exercising its powers of revision," the "*also*" plainly implying that it may be independently made by those Courts as well as by the original Courts specified in the first clause, and it is neither suggested nor implied that the powers of the original Court should in any way control or limit those of the appellate or revisional authority. To support of this view we may refer to the judgment reported in the case of *Donasami Naidu v Emperor*<sup>1)</sup>, which throws doubt upon the correctness of the decisions above mentioned. We may say that we entirely concur in the reasoning of the latter part of that judgment.

For these reasons we dismiss the application.

R R

(1) (1906) 50 Mad. 187

## APPELLATE CIVIL.

*Before Mr Justice Batchelor and Mr Justice Chauluk*

NATHU PIRAJI MARWADI (ORIGINAL PLAINTIFF) APPELLANT v  
UMEDMAL GADUMAI (ORIGINAL DEFENDANT) RESPONDENT \*

1908

July 22

*Practice—Allegations by parties at trial—Case determined  
on those allegations—Habit of a case in appeal*

A litigating party can only succeed *secundum allegata et probata* and the Courts should check the tendency of defeated litigants to evade their defeat by devising a new case which was never set up when it should have been set up.

A Court of appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he had never had notice during the hearing of the suit.

SECOND appeal from the decision of B C Kennedy, District Judge of Nasik reversing the decree passed by B R Mehendale, Joint Subordinate Judge at Nasik.

Suit for declaration that defendant was not entitled to possession of land.

The land belonged originally to one Piraji Marwadi, who died leaving a widow Gangabai. In 1887 Gangabai sold the property to one Dewrao, who sold it to Balvantrao in 1893. Balvantrao in 1893 and 1895 mortgaged it to Gadumal, the defendant.

Meanwhile, Nathu Piraji was adopted by Gangabai in 1884.

\* Second Appeal No 227 of 1907

1908

NATHU  
PIRAJI  
v  
GADUMAL

In 1897, Nathu Piraji (plaintiff) sued Balvantrao to recover possession of the property. Gadumal was not a party to that litigation. Nathu Piraji got a decree in 1903 against Balvantrao, in attempting to execute which he was obstructed by Gadumal. Nathu Piraji filed this suit to recover possession from Gadumal, alleging that the property was his ancestral property.

The defendant denied that he was bound by the former proceedings, and contended that his equitable right to retain possession had matured, and that the debt due to the defendant must be paid off before plaintiff could recover.

The Subordinate Judge held that the mortgage was proved, that the defendant was not barred by the former suit, that the claim was not barred, and that the plaintiff was entitled to recover possession with mesne profits for the period he had been dispossessed by defendant.

On appeal, the District Judge remanded the case to the Subordinate Judge for the determination of the following issues —

1 "Was the sale by Gangabal to Dewrao invalid as against the present plaintiff?"

2 "If not, what is due on the mortgage?"

The Court on remand found the first issue in the negative and found that Rs 7,266 were due.

These findings were certified to the District Judge who reversed the decree and dismissed the suit, on grounds which were expressed as follows —

"From the facts of the present case and from the position of the parties it is clear that what was required was that the plaintiff should show that he was the adopted son of Piraji and that the property in suit was part of Piraji's estate and that it was part of the estate dealt with by the guardianship order of 1885. Until these facts were made out the case of the plaintiff against the present defendant was not in my opinion established. It did not occur to me that anything more than the merest formal proof of these facts would be necessary or indeed that they would be seriously contradicted and my sole reason for remanding the case was that there might be some proof of these points which the lower Court had in my opinion wrongly held to be proved by the judgments in the cases between the present plaintiff on the one hand and Dewrao and Balvantrao on the other. No such formal proof has however been adduced and accordingly it is not shown that plaintiff was the adopted son of Piraji, and that the property in suit could not be dealt with effectively by Gangabal . . .

In the absence of any evidence I must hold that plaintiff has not shown that he is entitled to recover from the present defendant. But I note that assuming the judgments referred to to be admissible as proving the status of plaintiff I should hold on them that Nathu was the adopted son of Paraji, that the property in suit was dealt with by the guardianship order and that Gangabai's alienation to Dewrao and consequently the subsequent transfer to the present defendant were ineffective, and that accordingly the plaintiff is entitled to recover.

Meanwhile I must reverse the order of the lower Court and dismiss the suit with costs.

The plaintiff appealed to the High Court

*Intervently*, with *R R Desai*, for the appellant

*Robertson*, with *S S Patkar*, for the respondent

BACHELOR, J. —The first question raised in this appeal turns upon the manner in which the case was dealt with by the lower appellate Court, and to appreciate the point, it will be necessary to refer to the pleadings and issues.

The suit was one to obtain possession of certain land, and in the first paragraph of the plaint, the property is claimed by the plaintiff as being his ancestral property. Reference is then made to certain proceedings in a previous litigation before the High Court to which it was said that the defendant had been a party.

The defendant's written statement contains nine paragraphs which traverse various allegations made in the plaint. But upon a fair reading of this written statement, we do not find that the ownership of the plaintiff is anywhere contested. It is true that there is a reference to the High Court proceedings in the appeal of 1902, but that reference we think, was merely to rebut an inference which the plaint had suggested that these earlier proceedings were binding upon the defendant, in the matter of the validity of the alienation. This view is supported by the fifth paragraph of the written statement in which the defendant's case is put upon adverse possession, and it is admitted that the lands in suit were formerly in the plaintiff's family.

Turning to the issues we find that there is no issue which clearly raises the question of title and that was the opinion formed of the pleadings and issues by the learned Subordinate Judge who tried the case in the first instance. We think, therefore, that no question of title was ever raised in the first Court.

1908.

NATHU  
PIRAJI  
v  
UNEDMAL  
GADUMAL.



1908

NATHU  
PIRAJI  
v  
UJ EDMAIL  
GADUMAL

When the case came before the District Judge on appeal, the District Judge remanded it for decision on this issue —

Was the sale by Gangabai to Dewrao invalid as against the present plaintiff?

Now that was an issue raising a point which had never been raised before and of which the plaintiff had consequently no notice. But the matter unfortunately does not rest there, for, when the Court of first instance makes its return to this order of remand, the District Judge proceeds to discuss and interpret his order in a particular manner, which, we think must have taken the parties by surprise. It was he says the object of this issue to raise the questions whether the plaintiff was the adopted son of Piraji, whether the property in suit was part of Piraji's estate and whether it was part of estate dealt with by the guardianship certificate. All these are points which no doubt might have been taken in defence but which never had been taken and should therefore, not have been allowed to be raised at the final stage of the appeal. We do not think that the District Judge was justified in exposing the plaintiff after he had obtained his decree to the brunt of a new attack of which he had never had notice during the hearing of the suit. A litigating party can only succeed *secundum allegata et probata*, and the Court should check the tendency of defeated litigants to evade their defeat by devising a new case which was never set up when it should have been set up.

It was endeavoured then to support the decree upon the point of limitation. But here we have the concurrent findings of both the Courts that the mortgagee's possession was not continuous for twelve years, but had suffered an interruption for at least two years.

The result, therefore is that the decree of the District Judge must be reversed and the decree of the Subordinate Judge restored and the plaintiff must have his costs throughout.

*Decree reversed*

## APPELLATE CIVIL

*Before Chief Justice Scott and Mr Justice Heaton*

SHIVPAM DHONDU PUJARA (ORIGINAL DEFENDANT 14), APPELLANT,  
 v. SAKHARAM KRISHNA KULKARNI (ORIGINAL PLAINTIFF)  
 RESPONDENT \*

1908

July 30

*Hindu Law—Mitakshara—Liability of sons to pay father's debt—Money decree—Appeal by some of the parties to a decree—Decree in appeal final—Execution—Civil Procedure Code (Act XIV of 1882), sections 234, 244, 252—Limitation Act (XV of 1877), Schedule II, Article 179*

A money decree obtained against the father of an undivided Hindu family governed by the Mitakshara law can be executed after his death against his sons to the extent of the ancestral property that has come to their hands even if the debt has been incurred for the sole purposes of the father provided that it is not tainted with immorality or illegality and if the son against whom the decree is sought to be executed as representative of his father takes the objection that the debts are tainted with immorality, he can do so under section 244 of the Civil Procedure Code (Act XIV of 1882)

*Umed Hallising v Goman Bhayji* (1), followed

There is no substantial distinction in regard to questions arising in execution between the position of legal representatives added as parties to the suit before decree and legal representatives brought in after decree. All questions between them and the decree holder relating to execution must alike be disposed of under section 244 of the Civil Procedure Code (Act XIV of 1882)

Where some of the parties to a decree appeal against it, the decree in appeal is the final decree for the purpose of execution with respect to all the parties

SECOND appeal from the decision of J D. Dikshit, Assistant Judge of Ratnagiri, confirming the order of K. K. Sunavala, Subordinate Judge of Malvan, in an execution proceeding

The plaintiff brought a suit against one Dhondu Lala, his two brothers and other co-sharers, for the recovery of Rs 1,275 5 6

\* Second Appeal No. 227 of 1908

(1) (1896) 20 Bom. 345

1913.

SIVARAM  
v  
AKHABAM.

duc under two money bonds executed by Dhondu Lala alone. The plaintiff wanted a decree against all the defendants alleging that Dhondu was the manager of the family and that the debt was contracted by him for the joint purposes of the whole family. At an early stage of the suit Dhondu Lala died and his sons were brought on the record as defendants 13, 14 and 15. The Court, on the 31st March 1903, gave a decree to the plaintiff against the assets of Dhondu Lala and dismissed the suit against the other defendants. The plaintiff appealed against that part of the decree which dismissed the suit against the other co-parceners. But his appeal was dismissed. Dhondu Lala's representatives, defendants 13, 14 and 15 did not appeal against the decree against the assets of the deceased. The plaintiff having in the year 1906, that is, within three years of the date of the appellate decree and more than three years after the date of the first decree, presented a darkhast for the execution of the decree, defendant 14 contended that Dhondu Lala and defendants 13, 14 and 15 were joint and that the said defendants being the survivors were the sole owners of the property. He further contended that the darkhast was time-barred.

The Subordinate Judge found that the darkhast was in time, that the decree-holder was entitled to execute his decree against the interest of Dhondu Lala in the properties mentioned in the darkhast, that the said interest included the shares of defendants 13, 14 and 15 and that the decretal debt was of such a nature that the said defendants were bound to pay it. He, therefore, ordered that execution should proceed according to the darkhast.

Against the said order defendant 14 appealed and the Assistant Judge confirmed the decree.

Defendant 14 preferred a second appeal.

*M. R. Boda*, for the appellant (defendant 14) — Our father who was defendant 1 died before decree and we and our brothers were brought on the record as legal representatives of the deceased. As the decree was passed against the estate of our father, the execution of the decree cannot now proceed against us. At the

time the decree was passed our father had no subsisting interest as it had already passed to us by survivorship

1908

SHIVRAM

v

SAKHARAM

Next, the plaintiff applied for execution more than three years after the decree of the Court of first instance. The application was therefore not within time. It was an error to compute the period of limitation from the date of the appellate decree to which we were not a party. The parties to the appeal were the plaintiff and the other defendants. Therefore clause 2 of the third column of article 179, schedule II of the Limitation Act cannot apply.

*K. N. Koyas*, for the respondent (plaintiff) —The liability of the sons in execution proceedings is settled by the ruling in *Umed Hathising v. Goman Bhai* <sup>1</sup>.

[ SCOTT, C. J. referred to *Amar Chandra Kundu v. Sebak Chand Ghoshdhury* <sup>2</sup> ]

That decision entirely supports our case. The liability of the sons taking ancestral property by survivorship can be determined in execution proceedings. A separate suit for the purpose is not necessary and such a suit will not lie.

As to limitation the plain words of clause 2 of the third column of article 179, schedule II of the Limitation Act must be strictly followed. That is now the settled rule of the three High Courts in India. *Lakshman Ramchandra v. Satyabhamabai* <sup>3</sup>, *Kant Chunder Goswami v. Bisheswar Goswami* <sup>4</sup>, *Krishnama Channar v. Mangammal* <sup>5</sup>. In *Mashiat Un-Nissa v. Rani* <sup>6</sup>, two of the five Judges held the same view, and the case was distinguishable in some respects as pointed out in *Kant Chunder Goswami v. Bisheswar Goswami* <sup>4</sup>.

SCOTT, C. J. —The opponents in these execution proceedings are Hindus governed by the Mitakshara law. The original first defendant, their father, died before decree. On his death the opponents were placed on the record as defendants as his legal

(1) (1890) 2 Bom 355

(2) (1907) 31 Cal 617

(3) (1877) 2 Bom 401

n 13 5—6

(4) (1898) 2 Cal 555

(5) (1902) 26 M 1 91

(6) (1889) 13 All 1

1908

SHIVRAM  
v  
BAKILARAM

representatives The plaintiff has obtained a simple money decree against them as such legal representatives for Rs 1,271 5 6 and costs to be recovered from the estate of the deceased He has attached various properties mentioned in the application for execution which with a few trifling exceptions are ancestral properties which devolved exclusively upon the opponents by right of survivorship on their father's death They claim that the ancestral properties formed no part of the estate of their father at the date of the decree and consequently are not liable to attachment It is no doubt correct that at the date of decree the properties in question formed no part of the estate of the deceased It has however been decided by this Court in *Umed Hathising v Goman Bhaiji*<sup>(1)</sup>, that a money decree obtained against the father of an undivided Hindu family can be executed after his death against his sons to the extent of the ancestral property that has come into their hands even if the debt has been incurred for the sole purposes of the father provided that it is not tainted with immorality and illegality and if the son against whom the decree is sought to be executed as representative of his father takes the objection that the debts are tainted with immorality he can do so under section 244 of the Civil Procedure Code That was a case in which the decree was sought to be executed against the son as legal representative under section 234 of the Code The present is a case in which execution is sought against the sons added as legal representatives before decree, a situation dealt with in section 252

There is however no substantial distinction, in regard to questions arising in execution, between the position of legal representatives added as parties to the suit before decree and legal representatives brought in after decree under section 234 All questions between them and the decree-holder relating to execution must now be disposed of under section 244 We, therefore, must follow the decision above referred to and we hold that it was open to the opponents to dispute in this proceeding the liability of the ancestral properties for the debt of their father on the ground that the debt was tainted with immorality

or illegality. They cannot insist on the plaintiff resorting to a fresh suit to enforce their pious obligation as Hindu sons to satisfy the debt out of these properties because the question having arisen in execution proceedings between the decree holder and themselves as parties to the suit, a separate suit is rendered inadmissible by the provisions of section 244.

As the opponents have not impeached their father's debt on the ground either of immorality or illegality the decree-holder is entitled to execute his decree against all the attached properties unless his right to do so is, as contended by the opponents, barred by the law of Limitation under Article 179 of the 2nd schedule to the Limitation Act. It is contended on their behalf that the words of clause 2 in the third column of that article should not be taken literally and that as the opponents did not appeal against the original decree, although other defendants did, the date of the final decree of the appellate Court which was passed within three years from the institution of these proceedings is a date which does not concern the opponents as the original decree which was final so far as they were concerned was passed more than three years before. We, however, are not disposed thus to disregard the plain words of clause 2. There was an appeal and the final decree of the appellate Court was passed less than three years before plaintiff's application. That application is therefore within time. We confirm the judgment of the lower Court and dismiss the appeal with costs.

*Decree confirmed.*

G I P.

1908

SIVARAM  
v  
SANKHARAM

## APPELLATE CIVIL.

*Before Chief Justice Scott and Mr Justice Chandavarkar.*

1908.

August 11.

RANU BIN SHIVJI BARATE (ORIGINAL DEFENDANT 5), APPELLANT, v.  
LAXMANRAO KRISHNA LIMAYE AND ANOTHER (ORIGINAL PLAINTIFF  
AND DEFENDANT 1)\*

*Transfer of Property Act (IV of 1882), section 59—Dekkhan Agriculturists' Relief Act (XVII of 1879), section 63 (A) (1)—Mortgage-deed—Attestation by two witnesses—Signature by the Sub-Registrar—Statement by the writer of the deed in concluding the writing of the body of the document that it was written by him*

A deed of mortgage was signed by the Sub Registrar who was bound to attest it under the provisions of section 63 (A) of the Dekkhan Agriculturists' Relief Act (XVII of 1879) and the writer of the deed in concluding the writing of the body of the document stated that it was written by him. The deed was not attested by two witnesses as required by section 59 of the Transfer of Property Act (IV of 1882)

*Held*, that neither the signature of the Sub-Registrar nor the statement by the writer that the body of the document was written by him were sufficient for effecting a valid mortgage.

An attesting witness is a "witness who has seen the deed executed and who signs it as a witness"

*Burdett v. Spilisbury*<sup>(2)</sup>, followed.

\* Second Appeal No. 42 of 1908.

(1) Section 63 (A) of the Dekkhan Agriculturists' Relief Act (XVII of 1879).—

63A. *Mode of execution by agriculturists of instruments required to be registered under Act III of 1877.*—(1) When an agriculturist intends to execute any instrument required by section 17 of the Indian Registration Act, 1877, to be registered under that Act, he shall appear before the Sub-Registrar within whose sub district the whole or some portion of the property to which the instrument is to relate is situate and the Sub-Registrar shall write the instrument, or cause it to be written, and require it to be executed, and attest it, and, if the executant is unable to read the instrument, cause it to be further attested, and otherwise act in accordance with the procedure prescribed for a Village Registrar by sections 57 and 59 of this Act, and shall then register the instrument in accordance with the provisions of the Indian Registration Act, 1877.

(2) An instrument to which sub section (1) applies shall not be effectual for any purpose referred to in section 49 of the Act last mentioned unless it has been written, executed and attested in the manner provided in that sub-section.

(3) (1843) 10 C. & F. 310

SECOND appeal from the decision of R. D. Nagailar, Joint First Class Subordinate Judge of Poona, with appellate powers reversing the decree of T. N. Sanjana, Second Class Subordinate Judge of Haveli at Poona

1908  
RANU  
LAXMANBAO

Suit for a declaration that a certain deed was a valid mortgage or charge upon property

The plaintiff alleged that the property in suit was mortgaged to him by defendants 2, 3 and 4 to secure repayment of Rs. 1,400 at 10 per cent under a deed dated the 8th September 1893 and that Rs. 2,500 were due to him under the said deed on the date of the suit, that in execution of a decree obtained by defendant 1 the mortgaged property was attached, that the plaintiff thereupon presented an application praying that the attached property be sold subject to his mortgage encumbrance, but the Court dismissed the application on the 17th August 1904, holding that the mortgage deed, not having been attested by at least two witnesses as required by section 59 of the Transfer of Property Act (IV of 1882), was invalid and ineffectual to create a mortgage or a charge. The plaintiff therefore, brought the present suit for a declaration that the mortgage deed effected a valid mortgage or charge upon the property and that he was entitled to hold the property as security for the payment of the amount due thereunder.

Defendant 1 denied the plaintiff's mortgage or his charge upon the property and contended, *inter alia*, that the document relied on by the plaintiff was illegal, without consideration invalid and ineffectual.

Defendants 2, 3 and 4 were absent.

Defendant 5, the execution purchaser who was joined as co-defendant after the institution of the suit raised substantially the same defence as defendant 1.

The Subordinate Judge found that the mortgage-bond sued on was not proved according to law and it could not be used as evidence and that it was not effectual to create a valid mortgage of the property described therein, and failing to operate as a mortgage, it could not be used as creating a charge. The



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RANU

v

ANMANRHO

Subordinate Judge, therefore, dismissed the suit observing as follows —

The mortgage deed (exhibit 31) has been written under the provisions of the Dekkhan Agriculturists' Relief Act. The writer thereof (exhibit 30) swears that the defendant Govind Ranganath signed it for himself and as the Mukhtiyar of the defendant Balkrishna Ranganath and that the defendant Waman signed it himself in his presence. The bond bears no attestation excepting that of the Sub Registrar. The Sub Registrar has been examined on commission (exhibit 39) but he simply admits the attestation and his other signatures on the bond to be in his handwriting. But he was not put a single question regarding execution and his evidence does not prove execution. Section 68 of the Evidence Act provides: "If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence." In this case the document being a mortgage deed is required by section 59 of the Transfer of Property Act to be attested by at least two witnesses. It has been attested by one witness only, viz., the Sub Registrar, but although his evidence has been given it has not been given for the purpose of proving the execution of the document. Consequently under section 68 of the Evidence Act, the document cannot be used as evidence of the mortgage transaction which can be effected by an attested document only. I cannot therefore hold the execution of the document as a mortgage bond proved.

Even holding it proved I find that the deed having been passed after the Transfer of Property Act was extended to this Presidency, is invalid and ineffectual to create a mortgage not having been attested by at least two witnesses as required by section 59 of the Transfer of Property Act. The learned pleader for the plaintiff contends that the deed was executed under section 63A of the Dekkhan Agriculturists' Relief Act which requires the document to be attested by the Registrar alone which has been done in this case. That it is only when the executant is unable to read the instrument that this section requires the document to be further attested and that in this case the executants knew to read and write and so further attestation was unnecessary. I think the argument is not correct. Beyond doubt the document has been properly executed in accordance with the provisions of the section 63A of the Dekkhan Agriculturists' Relief Act but the question is whether that is sufficient to effect a valid mortgage. Section 63A of the Dekkhan Agriculturists' Relief Act does not provide how a transfer of property, such as mortgage can be effected. That is provided by section 59 of the Transfer of Property Act. The above section of the Dekkhan Agriculturists' Relief Act simply prescribes the mode in which documents by agriculturists should be executed. That mode applies to all documents to be executed by agriculturists whether required by law to be attested or not. To ensure the genuineness of a document and to further pre-

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RASU  
v  
LAXMANRAO

vent any fraud being committed against an agriculturist, it requires all documents to be executed by agriculturists whether required by law to be attested or not to be attested by the Sub Registrar and where the executant is illiterate to be further attested by other persons. It does not in any way affect the requisites prescribed by section 59 of the Transfer of Property Act for effecting a valid mortgage. A valid mortgage for Rs 100 and upwards could only be effected under the above section by a registered instrument signed by the mortgagor and attested by at least two witnesses. Where the mortgagor is an agriculturist the further precautions laid down in section 63A of the Dekkhan Agriculturists Relief Act have to be followed and the document has to be written by or under the superintendence of the Sub Registrar and to be attested by him. That does not do away with the necessity of two attestations required by section 59 of the Transfer of Property Act to effect the mortgage itself. I therefore find that the document relied on by the plaintiff is invalid and ineffectual to create a valid mortgage, nor can the failure to comply with the provision for attestation contained in section 59 of the Transfer of Property Act convert a mortgage transaction into a charge (see *Narayan Babaji v Lakshmandas* 7 Bombay Law Reporter, p 934). The plaintiff's suit must therefore be dismissed.

On appeal by the plaintiff the Subordinate Judge's decree was reversed and the suit was allowed on the following grounds —

The lower Court thinks that the mortgage deed (exhibit 31) is a document which is required by law to be attested (section 59 of the Transfer of Property Act) and that therefore it cannot be used as evidence until one attesting witness at least has been called for the purpose of proving its execution (section 68 of the Evidence Act). The writer of the deed (exhibit 30) was called as a witness for the purpose of proving its execution and has deposed to its execution by the obligor. The only question is whether he can be treated as an attesting witness. The evidence of the writer of the deed who has signed his name, though not explicitly as an attesting witness on the margin and has been present when the deed was executed is admissible under this section (section 59) of the Transfer of Property Act as of an attesting witness. (Gowd's Transfer of Property Act, second edition vol II, p 645). This remark is based upon *Radha Kisen v Fateh Ali* 1 L R 20 All 532 and other cases given in the footnote No. 6 on page 605. In the present case the writer has signed his name on the deed and according to his evidence he was present when the deed was executed. His evidence is therefore admissible as of an attesting witness and the provisions of section 68 of the Evidence Act are sufficiently complied with.

In the next place it is possible to treat the evidence of the Sub Registrar (exhibit 39) as proving execution. He sat on oath on reading the endorsement on the mortgage bond (exhibit 31) that it was registered according to the provisions of the Dekkhan Agriculturists Relief Act. Section 63A of the Act requires him to attest a document like the mortgage deed (exhibit 31) and he

1900.

Rao

v

LAXMANNAO

has further admitted on oath his five signatures on the document. The first endorsement at the foot of the document, which is signed by him in his official capacity, shows that he saw the executants sign the document. Though no direct question was asked to him, as to the fact of execution by the obligors, the effect of his evidence in my opinion, is that he proves execution by the obligors. Even assuming that that is not its effect, the document is, I think, sufficiently proved by the evidence of the writer (exhibit 30), which can be treated as the evidence of an attesting witness for the purposes of section 68 of the Evidence Act.

Defendant 5 preferred a second appeal.

*D. A. Khare*, for the appellant (defendant 5).

*G. S. Rao*, for respondent 1 (plaintiff).

*N. M. Patwardhan* for respondent 2 (defendant 1).

SCOTT, C. J.—The deed upon which the plaintiff relies being a mortgage deed to secure repayment of Rs. 1,400 must, in order to be effective, be attested by two witnesses (see section 59 of the Transfer of Property Act). Assuming that we may take the signature of the Sub Registrar who was bound to attest under the provisions of section 63A of the Delkhan Agriculturists' Relief Act as that of an attesting witness, there is no one else whose name appears on the document who purports to sign as an attesting witness. But it is argued that the writer of the deed who, in concluding the writing of the body of the document, states that it is written by him, can be treated as an attesting witness. It was not suggested in the first Court that he could be regarded in this light, but the appellate Court relying upon a passage in Gour's Transfer of Property Act and upon the case of *Radha Kishen v. Patel Ali Ram*<sup>(1)</sup>, has held that his evidence was admissible as that of an attesting witness and that the provisions of section 68 of the Evidence Act had been sufficiently complied with. We cannot gather from the report in *Radha Kishen v. Patel Ali Ram*<sup>(2)</sup> in what manner or place the scribe in that case affixed his name to the deed, we are however of opinion that the name of the writer in the case now before us cannot be held to be an attestation. It occurs before the names of the executing parties and forms part of the body of the document. In *Burdett v. Spilsbury*<sup>(3)</sup> Lord Campbell said

(1) (1900) 23 All. 23.

(2) (1903) 10 C. & L. 340 at p. 417.

"What is the meaning of an attesting witness to a deed? Why it is a witness who has seen the deed executed, and who signs it as a witness." This, we think, is the meaning of attesting witness in section 68 of the Evidence Act and we therefore hold that the writer in the circumstances of this case cannot be treated as an attesting witness.

It has, however, been argued that the Dekkhan Agriculturists' Relief Act is a special enactment which is not affected by the Transfer of Property Act and that the latter Act has no application to this case. The answer to this argument is given by the Subordinate Judge in the original Court. He says "Beyond doubt the document has been properly executed in accordance with the provisions of section 63A of the Dekkhan Agriculturists' Relief Act, but the question is whether that is sufficient to effect a valid mortgage. Section 63A of the Dekkhan Agriculturists' Relief Act does not provide how a transfer of property such as a mortgage can be effected. That is provided by section 59 of the Transfer of Property Act. The above section of the Dekkhan Agriculturists' Relief Act simply prescribes the mode in which documents by agriculturists should be executed. That mode applies to all documents to be executed by agriculturists whether required by the law to be attested or not. It does not in any way affect the requisites prescribed by section 59 of the Transfer of Property Act for effecting a valid mortgage."

We allow the appeal. We set aside the decree and dismiss the suit with costs throughout on the plaintiff. Separate sets of costs between the appellant (defendant No 5) and defendant No. 1.

*Decree reversed*

G R R

## APPELLATE CIVIL.

*Before Mr. Justice Batchelor and Mr Justice Chaulat*

1904

July 31

DATTATRAYA WAMAN TILLU (ORIGINAL DEFENDANT No 1) APPELLANT v RUKHMABAI KUM PANDURANG DAMODUR TILLU (ORIGINAL PLAINTIFF) RESPONDENT \*

*Hindu widow—Maintenance—Widow having her husband's property in her hands—The property sufficient to maintain her for some years—Suit for declaration and for arrears of maintenance—Premature suit*

The plaintiff, a Hindu widow filed a suit to recover arrears of maintenance and to obtain a declaration of her right to maintenance. At the time the suit was brought she was found to be in possession of a fund belonging to her husband's family estate which sum was sufficient to provide for her maintenance for five years at the rate allowed by the lower Court.

*Held*, that no cause of action had accrued to the plaintiff. At the date when the suit was brought the Court was not in a position to forecast events or to anticipate the position of affairs five years later.

SECOND appeal from the decision of Gulabdas Laldas, First Class Subordinate Judge, A P, at Thana, reversing the decree passed by M. H. Wagle, Subordinate Judge at Alibag.

Suit for a declaration to recover maintenance and for arrears of maintenance.

The plaintiff's husband Pandurang and his brother Waman (father of defendants) formed a joint family. Pandurang died in March 1897; and Waman died on the 25th November 1900.

Soon after Pandurang's death, his widow Rukhmabai drew Rs 937 3 7, which were deposited in her husband's name in the Postal Savings Bank.

The present suit was brought on the 9th February 1904 to obtain a declaration that the plaintiff was entitled to get from the family estate, in the hands of the defendant, maintenance at the rate of Rs. 120 a year, and for Rs 360 being the amount of the arrears of three years' maintenance.

The defendants contended *inter alia* that the income of the money she had withdrawn from the Savings Bank was enough to support her, and that she was entitled to Rs 6 a month for maintenance.

The Subordinate Judge held that Rs. 6 per month were sufficient for plaintiff's maintenance, but that her suit was premature. His reasons were as follows :—

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DATTATRAYA  
v  
RUKHMAHAL.

"The plaintiff admits that she withdrew the amount of Rs. 937-3 7 from her husband's account in the Post Office Savings Bank . . . Assuming that it was the plaintiff's husband's property she cannot sue for maintenance, so long as she has that money in her hand (*Bai Kanai v Bai Parvati*, P. J. 1890, 182). In her deposition taken on commission the plaintiff has stated that she paid to her brother Rs. 390 as the feeding charges for five years. The deposition was taken in February 1905, and the suit was filed on the 9th February 1904. If the plaintiff had money to pay the boarding charges for five years, what was the necessity of claiming arrears of maintenance? If no arrears could be claimed, and if she had money that would last her for some time more, she had no cause of action. She does not say that she got the money after the institution of the suit. She has given an account of how she spent the balance of the money. She says that she spent some money for the expenses of this suit, yet she has claimed the costs of the suit. If she had money to spend on the suit, why did she not apply the same for maintenance? The other alleged expenditure is unjustifiable. She cannot spend her husband's money in any way she pleases and then ask for maintenance from the family property, or rather she cannot claim maintenance while she has her husband's money in her hands. The suit is therefore brought without any cause, and hence it must be held to be premature."

On appeal, the lower appellate Court held that the plaintiff should be awarded maintenance at Rs. 100 a year, and that though she had withdrawn Rs. 937-3 7 from the Savings Bank, and that though the present suit was not therefore premature or unsustainable, yet the amount together with its interest should be taken into consideration and first applied towards the maintenance expenses of the plaintiffs, and that the balance, if any, should be returned to defendant No. 1. The decree passed was that the plaintiff was declared entitled to a maintenance allowance of Rs. 8-5-4 a month, that her claim for arrears be dismissed, and that she should pay Rs. 184 to defendant No. 1 and in default should not be allowed to recover her monthly allowance till the 9th January 1909.

The defendant No. 1 appealed to the High Court.

*N. V. Gokhale*, for the appellant.

*P. P. Khare*, for the respondent.

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DAVID LAL  
v  
THE STATE

BATCHELOR, J. —This was a suit for maintenance brought by a Hindu widow. The Judge of first instance dismissed the suit on this among other grounds that it was premature. The learned Judge in the Court of Appeal differing from that view allowed the suit and gave the plaintiff a decree for maintenance at the rate of Rs 100 a year.

The only question raised in this appeal is whether the cause of action had accrued to the plaintiff when this suit was filed in February 1904. At that time the findings of the Court show that the plaintiff was in possession of a fund belonging to her husband's family estate, which fund was sufficient to provide for her maintenance for five years at the rate allowed by the lower Court. And in this state of the facts, we are of opinion that no cause of action had accrued to the plaintiff. In 1904 the Court was not in a position to forecast events or to anticipate the position of affairs five years later. In other words it was not in a position to make a decree for maintenance, and no liability to provide maintenance could in the then existing circumstances attach to the appellant.

It is urged that the Court might have made a mere declaratory decree affirming the plaintiff's abstract right to maintenance. But assuming that such an abstract prayer was competent, it was not a prayer put forward by the plaintiff, her prayer was for maintenance at the rate of Rs 120 a year. We think, therefore, that the Subordinate Judge of first instance was right in the view which he took upon this point and we must reverse the decree under appeal and dismiss the suit with costs throughout.

We may add that Mr. Khare has attempted to enlist our sympathy in favour of his client. But upon that point we need only say that whatever the sympathies of the Court may be worth, they do not range themselves on the side of the plaintiff.

*Decree reversed.*

R R.

List of Books and Publications for sale which are more than two years old.

## LEGISLATIVE DEPARTMENT.

[These publications may be taken from the Office of the Superintendent of Government Printing, India No. 5, Hastings Street, Calcutta.]

The Prices of the General and Local Codes, Merchant Shipping Digest and Index to the Statutes have been considerably reduced.

### I—The Indian Statute Book

REVISED EDITION

*Superior 18vo cloth red*

#### A—Statutes

A Collection of Statutes relating to India, Volume I, containing the Statutes up to 1st Dec 1841 till 1859 Rs 6 (10s)

A Collection of Statutes relating to India, Volume II, containing the Statutes from 1861 to 1899 till 1901 Rs 8 (10s)

#### B—General Acts

General Acts of the Governor General of India in Council Vol I from 1834 to 1867 Edition 1898 Rs 7 (10s)

General Acts of the Governor General of India in Council Vol II from 1868 to 1899 Edition 1899 Rs 5 (10s)

General Acts of the Governor General of India in Council Vol III from 1897 to 1899 Edition 1899 Rs 5 (9s)

General Acts of the Governor General of India in Council Vol IV from 1892 to 1899 Edition 1899 Rs 7 (10s)

General Acts of the Governor General of India in Council Vol V from 1895 to 1899 Edition 1899 Rs 6 (9s)

General Acts of the Governor General of India in Council Vol VI from 1901 to 1899 Edition 1899 Rs 7 (10s)

General Acts of the Governor General of India in Council Vol VII from 1899 to 1901 Edition 1901 Rs 3 (6s)

#### C—Local Codes

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ed in force in	
74 in Chronological	
Rs 28 (7s.)	
re in British Balu	
Rs 5 (10s)	
Rs 5 (9s.)	

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### II—Reprints of Acts and Regulations of the Governor General in Council, as modified by subsequent Legislation

Act X of 1841 and XI of 1850 (Registration of 1st December 1893 (with foot notes brought 1901) to  
Act XX of 1847 (Copyright), as modified up to 1st Dec



Act XVIII of 1850 (Judicial Officers' Protection) with foot notes	1a 9p (1a)
Act XIX of 1850 (Apprentices), as modified up to 1st May, 1805	3i 6p (1a)
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903	2i 6p (1a)
Act VIII of 1851 (Tolls on Roads and Bridges), as modified up to 1st June, 1887	2i 6p (1a)
Act XII of 1855 (Legal Representatives Suits), as modified up to 1st November, 1904	1i (1a)
Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903	2a (1a)
Act XXVIII of 1855 (Usury Lawa Ropcal), as modified up to 1st December, 1903	1a 6p (1i)
Act XX of 1856 (Police Chaukidars), as modified up to 1st November, 1903	7a (1a)
Act IV of 1857 (Tobacco, Bombay Town), as modified up to 1st August, 1885	3a 7p (1i)
Act XXIX of 1857 (Land Customs, Bombay), as modified up to 1st December, 1895	4a (1a)
Act III of 1858 (State Prisoners), as modified up to 1st August, 1897	2i (1a)
Act XXXIV of 1858 [Lunacy (Supreme Courts)], as modified up to 30th April, 1903	4i 3p (1a)
Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April, 1903	2i 3p (1a)
Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902	5i (1i)
Act I of 1858 (Merchant Shipping), as modified up to 30th June, 1805	13i (2i)
Act XI of 1858 (Bengal Land Revenue Sales), as modified up to 1st August, 1808	4a (1a)
Act XIII of 1858 (Workman's Breach of Contract) as affected by Act XVI of 1874	1a 6i (1a)
Act IX of 1860 [Employers and Workmen (Disputes)], as modified up to 1st December, 1904	1i 6p (1i)
Act XXI of 1860 (Societies Registration), as modified up to 1st December, 1904	2i 7p (1a)
Act XLV of 1860 (Indian Penal Code), as modified up to 1st April, 1805, with an Index	1i 2 3 (1i)
Act V of 1861 (Police), as modified up to 7th March, 1903	2a 6p (1a 6p)
Act XVI of 1861 (Stage carriages), as modified up to 1st February, 1898	3i 6p (1a)
Act XXIII of 1863 (Claims to Waste lands), as modified up to 1st December, 1896	4a 9p (1a)

1904

Rs 1 2 (3a)
4i 9p (1a)
6a (1a)
7a (1a)
December,
10a (2a)
3i 6p (1a)
3i 9p (1a)
11a (2a)
6i 6i (1a)
6i (1a)

Act V of 1873 (Government Savings Bank), as modified up to 1st April, 1903	3i 6p (1a)
Act X of 1873 (Oaths), as modified up to 1st February, 1903	3i 9p (1a)
Act II of 1874 (Administrator General) as modified up to 1st July, 1890, with a list of Native States included within the limits of Bengal Madras and Bombay, respectively, for the purposes of the Act	11a (2a)
Act IX of 1874 (European Vagrancy), as modified up to 1st December, 1901	6i 6i (1a)
Act XIV of 1874 (Scheduled Districts), as modified up to 1st October, 1895	6i (1a)
Act XV of 1874	

Act XVII of 1878 (Fetters) as modified up to 1st June 1992	61 (1a 6p)
Act XVII of 1879 (Dehkan Agriculturists Relief) as modified up to 1st March, 1895	101 (2)
Act XVIII of 1879 (Legal Practitioners) as modified up to 1st May, 1896	7a 6p (1a)
Act VII of 1880 (Merchant Shipping) as modified up to 15th October 1891	10a (2a)
Act V of 1881 (Probate and Administration) as modified up to 1st July, 1899	12a (2a)
Act XV of 1881 (Factories) as modified up to 1st December 1904	6a 6p (1a 6p)
Act XXVI of 1881 (Negotiable Instruments) as modified up to 1st August, 1897	10a (1a)
Act XVIII of 1881 (Central Provinces Land revenue) as modified up to 1st March 1905	Re 12 (2a)
Act II of 1882 (Trusts) as modified up to 1st June 1903	101 (1a)
Act IV of 1882 (Transfer of Property) as modified up to 1st December 1905	15 (2a)
Act V of 1882 (Indian Easements) as amended by the Repealing and Amending Act 1891 (VII of 1891)	8a (1a)
Act VI of 1882 (Companies), as modified up to 1st August, 1898	Re 1 101 (a)
Act XII of 1882 (Salt) as modified up to 1st December 1899	61 (1a)
Act XIV of 1882 (Code of Civil Procedure) as modified up to 1st December, 1899	Re 3 (61)
Act XV of 1882 (Presidency Small Cause Court), as modified up to 1st June, 1906	101 (2a)
Act V of 1883 (Indian Merchant Shipping), as modified up to 1st December, 1894	6a (1a)
Act VIII of 1883 (Little Cocos and Preparis Island) as modified up to 1st October, 1992	1a 3p (1a)
Act XIX of 1883 (Land Improvement Loans), as modified up to 1st September, 1908	2a 6p (1a)
	11a (2a)
	31 01 (2a)
	61 (1a)
	February,
1903	21 (1a)
Act XVIII of 1884 (Punjab Courts) as modified up to 1st December 1899	a (1a)
Act XIII of 1885 (Indian Telegraph) as modified up to 1st March, 1895	61 (1a)
Act II of 1888 (Income tax) as modified up to 1st April 1903	81 (1a 6p)
Act VI of 1888 (Births Deaths and Marriages Registration), as modified up to 1st June 1891	6a (1a)
	0a (2a)
	01 0p (1a)
	904 1a 0p (1a)
	1st December
	61 (1a)
Act XIV of 1887 (Indian Marine) as modified up to 15th February, 1899	8a (1a)
Act V of 1888 (Inventions and Designs) as modified up to 1st July, 1903	9a (2a)
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904	1a 0p (1a)
Act VII of 1889 (Succession Certificates), as modified up to 1st December, 1903	61 6p (1a)
	11a (2a)
	7a (1a)
	3a (1a)
	1905, with
an Index	Re 1 0 (2a)
Act X of 1890 (Press and Registration of Books) as modified up to 1st December 1893	2a 0p (1a)
	amending the Schedules as
	12a (1a 6p)
	Judicial Courts Act (1891)
	1a 0p (1a)
	7a (1a)
	1896
	0a (2a)
	Burma Laws Act,
	2a 6p (1a 6p)

Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903	1a 6l (1a)
Act V of 1898 (Code of Criminal Procedure), as modified up to 1st April, 1903	Rs 3 10 (2a)
Act VIII of 1899 (Petroleum), as modified up to 1st December, 1904	7a (1a)
Act XIX of 1899 [Currency Conversion (Army)], as amended by Act VII of 1900	1a (1a)
Act - - - - - 1905	6a 6p (1a)
Act - - - - - 1904	5a 0p (1a)
Reg - - - - - modified up to	6a 0p (1a)

Regulation V of 1873 [Bongal (Eastern) Frontier], as modified up to 1st July, 1903	1a 9p (1a)
Regulation III of 1878 (Andaman and Nicobar Islands), as modified up to 1st February, 1897	5a 6p (1a)
Regulation I of 1880 (Assam Land and Revenue), as modified up to 1st June, 1894	13a (2a)
Regulation VI of 1888 (Ajmer Rural Boards), as modified up to 1st February, 1897	5a 6p (1a)
Regulation XIV of 1887 (Upper Burma Villages), as modified up to 1st April, 1891	5a (1a)
Regulation V of 1893 (Sonthal Parganas Justice), as modified up to 1st October, 1899	4a 9p (1a)
Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st April, 1902	6a (1a)

### III—Acts and Regulations of the Governor General of India in Council as originally passed

Acts (unrepealed) of the Governor General of India in Council from 1854 to 1908  
 Regulations made under the Statute 33 Vict, Cap 3, from No II of 1875 to 1908 8vo Stitched

[The above may be obtained separately The price is noted on each]

### IV.—Translations of Acts and Regulations of the Governor General of India in Council

Acts X of 1841 and XI of 1850 (Registration of Ships), as modified up to 1st December, 1893 with foot notes brought down to 1st December, 1901	In Urdu a 6p (1a)
Act XX of 1847 (Copyright), as modified up to 1st May, 1898	In Urdu 1a 3p (1a)
	In Nagri 1a 3p (1a)
Act XVIII of 1850 (Judicial Officers' Protection) with foot notes	In Urdu 6p (1a)
Ditto	In Nagri 6p (1a)
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April, 1903	In Urdu 6p (1a)
	In Nagri 6l (1a)
Act XXX of 1852 (Naturalization), as modified up to 1st December, 1902	In Urdu 6l (1a)
	In Nagri 6l (1a)
Act XII of 1855 (Legal Representatives' Suits), as modified up to 1st November, 1904	In Urdu 3p (1a)
	In Nagri 3p (1a)
Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903	In Urdu 6p (1a)
	In Nagri 6l (1a)
Act XX of 1856, as modified up to 1st November, 1903	In Urdu 2a 6l (1a)
	In Nagri 2a 6l (1a)
Act XXXIV of 1858 [Lunacy (Supreme Courts)], as modified up to 30th April, 1903	In Urdu 1a (1a)
	In Nagri 1a (1a)
Act XXXV of 1858 [Lunacy (District Courts)], as modified up to 30th April, 1903	In Urdu 1a (1a)
	In Nagri 1a (1a)
Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May, 1902	In Urdu 1a 6p (1a)

Act XIII of 1850 (Workman's Breach of Contract), as affected by	
Act XVI of 1874	In Urdu 3p (1a) In Nagri 3p (1a)
Act IX of 1860 [Employers and Workmen (Disputes)] as modified up to 1st December, 1904	Ditto In Urdu 3p (1a) In Nagri 3p (1a)
Act XLV of 1880 (Penal Code), as modified up to 1st April 1903	Ditto In Urdu 1 Pt 15 (2a) In Nagri 1 Pt 15 (2a)
Act V of 1801 (Police), as modified up to 7th March, 1903	Ditto In Urdu 2a 9p (1a) In Nagri 2a 9p (1a)
Act XVI of 1881 (Stage carriages), as modified up to 1st February, 1898	Ditto In Urdu 1a 3p (1a) In Nagri 1a 3p (1a)
Act III of 1804 (Foreigners) as modified up to 1st September, 1908	Ditto In Urdu 1a (1a) In Nagri 1a (1a)
Act VI of 1804 (Whipping), as modified up to 1st April, 1900	Ditto In Urdu 1a 6p (1a) In Nagri 1a 6p (1a)
Act III of 1885 (Carriers), as modified up to 31st May 1903	Ditto In Urdu 9p (1a) In Nagri 9p (1a)
Act III of 1887 (Gambling), as modified up to 1st December, 1898	Ditto In Nagri 2a (2a)
Act V of 1860 (Indian Articles of War), as modified up to 1st January, 1895	In Urdu 1a 3p (1a) In Nagri 1a 3p (1a)
Act VII of 1870 (Court fees), as modified up to 1st December, 1888	Ditto In Urdu 8a 3p (2a 6p) In Nagri 8a 3p (2a 6p)
Act I of 1871 (Cattle trespass), as modified up to 1st December 1893	Ditto In Urdu 1a 9p (1a) In Nagri 1a 9p (1a)
Act XXIII of 1871 (Pensions)	Ditto In Urdu 9p (1a) In Nagri 9p (1a)
Act I of 1872 (Evidence), as modified up to 1st May, 1908	Ditto In Urdu 8a (2a) In Nagri 8a (2a)
Act IV of 1872 (Punjab Laws), as modified up to 1st November, 1904	Ditto In Urdu 2a 6p (1a 6p)
Act IX of 1872 (Contract), as modified up to 1st September, 1899	Ditto In Urdu 9a 9p (3a) In Nagri 9a 9p (3a)
Act XV of 1872 (Christian Marriage), as modified up to 1st April 1891	Ditto In Urdu 4a (2a) In Nagri 4a (2a)
Act V of 1873 (Government Savings Bank), as modified up to 1st April, 1903	Ditto In Urdu 9p (1a) In Nagri 9p (1a)
Act VIII of 1873 (Northern India Canal and Drainage), as modified up to 15th July, 1899	Ditto In Urdu 1a 3p (1a) In Nagri 1a 3p (1a)
Act X of 1873 (Oaths), as modified up to 1st February 1903	Ditto In Urdu 9p (1a) In Nagri 9p (1a)
Act IX of 1875 (Majority), as modified up to 1st May, 1908	Ditto In Urdu 3p (1a) In Nagri 3p (1a)
Act I of 1877 (Specific Relief) as modified up to 1st February, 1904	Ditto In Urdu 1a 6p (1a 6p) In Nagri 1a 6p (1a 6p)
Act III of 1877 (Registration), as modified up to 1st December, 1896	Ditto In Urdu 1a 3p (1a) In Nagri 1a 3p (1a)
Act I of 1878 (Opium), as modified up to 1st December, 1898	Ditto In Urdu 1a 6p (1a) In Nagri 1a 6p (1a)
Act VII of 1878 (Forests), as modified up to 1st December, 1903	Ditto In Urdu 4a (1a 6p) In Nagri 4a (1a 6p)
Act XI of 1878 (Arms), as modified up to 1st May, 1904	Ditto In Urdu 2a (1a) In Nagri 2a (1a)
Act XVII of 1878 (Northern India Forests), as modified up to 1st June, 1902	Ditto In Urdu 2a (1a) In Nagri 2a (1a)



Act IV of 1893 (Indian Reserve Forces), as modified up to 1st March, 1893	In Urdu 3p (1a)
Ditto (as passed)	In Nagri 3p (1a)
Act V of 1888 (Inventions and Designs)	In Urdu 2a 3p (1a)
Act VI of 1888 (Debtors)	In Urdu 6p (1a)
Ditto	In Nagri 6p (1a)
Act VII of 1888 (Civil Procedure Amendment)	In Urdu 1a 9p (1a)
Ditto	In Nagri 1a 9p (1a)
Act I of 1889 (Metal Tokens), as modified up to 1st April, 1904	In Urdu 6p (1a)
Ditto	In Nagri 6p (1a)
Act II of 1889 (Measures of Length)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act IV of 1889 (Merchandise Marks), as modified up to 1st February, 1904	In Urdu 1a 9p (1a)
Ditto	In Nagri 2a (1a)
Act VI of 1889 (Probate and Administration)	In Urdu 6p (1a)
Ditto	In Nagri 6p (1a)
Act X of 1889 (Ports), as modified up to 1st June, 1894	In Urdu 5a (2a)
Act XIII of 1889 (Cantonments), as modified up to 1st March, 1895	In Nagri 3a (1a 9p)
Act XV	
Act XV	
Act XX of 1889 (Lunatic Asylums Amendment)	In Urdu 3p (1a)
Act I of 1890 (Revenue Recovery)	In Urdu 3p (1a)
Act II of 1890 (Amending Acts XVII of 1864, X of 1885, II of 1874 and V of 1881)	In Urdu 3p (1a)
	In Urdu 6p (1a)
	In Urdu 6p (1a)
	Urdu 2a 3p (1a 9p)
	05 In Urdu 6a (2a)
	In Nagri 8a (2a)
	In Urdu 3p (1a)
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	In Urdu 6p (1a)
	by In Urdu 3p (1a)
	In Nagri 6p (1a)
Act II of 1892 (Christian Marriage Validation)	In Urdu 3p (1a)
Act IV of 1892 (Bengal Court of Wards Amendment)	In Urdu 4a (1a)
Act VI of 1892 (Limitation Act and Civil Procedure Code)	In Urdu 3p (1a)
A	In Urdu 3p (1a)
A	In Urdu 2a 3p (1a 6p)
	In Nagri 1a 6p (1a 6p)
Act III of 1894 (Criminal Procedure and Penal Codes Amendment)	In Urdu 3p (1a)
Act V of 1894 (Civil Procedure Code Amendment)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act VIII of 1894 (Tariff) as modified up to 1st October 1903	In Urdu 1a (1a)
Ditto	In Nagri 3a 9p (2a)
Act IX of 1894 (Prisons)	In Urdu 1a 3p (1a)
Ditto	In Nagri 2a 3p (1a)
Act VII of 1895 (Civil Procedure Code and Punjab Laws Act Amendment)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
	In Urdu 3a (1a)
	In Urdu 1a 3p (1a)
	In Urdu 1a 3p (1a)
	In Nagri 1a (1a)
Act VI of 1896 (Indian Penal Code Amendment)	In Urdu 3p (1a)

Act VIII of 1898 (Inland Bonded Warehouses)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act XII of 1898 (Excise) as modified up to 1st August, 1905	In Nagri 2a 3l (1a)
Act I of 1897 (Act XXXVII of 1850 Amendment)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act II of 1897 (Criminal Tribes Act Amendment)	In Urdu 3p (1a)
Act III of 1887 (Epidemic Diseases)	In Urdu 3l (1a)
Ditto	In Nagri 3p (1a)
Act IV of 1897 (Fisheries)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act VI of 1897 (Negotiable Instruments Act Amendment)	In Urdu 3p (1a)
Ditto	In Nagri 3l (1a)
Act VII of 1897 (Indian Emigration Act Amendment)	In Urdu 3p (1a)
Ditto	In Nagri 9l (1a)
Act VIII of 1897 (Reformatory Schools)	In Urdu 3p (1a)
Ditto	In Nagri 9p (1a)
Act IX of 1897 (Provident Funds), as modified up to 1st April, 1903	In Urdu 9p (1a)
Ditto	In Nagri 9p (1a)
Act X of 1887 (General Clauses)	In Urdu 1a (1a)
Ditto	In Nagri 1a (1a)
Act XII of 1897 (Local Authorities Emergency Loans)	In Urdu 3p (1a)
Ditto	In Nagri 3l (1a)
Act XV of 1897 (Cantonments)	In Urdu 3p (1a)
Act I of 1888 [Stage carriages Act (1861) Amendment]	In Urdu 3l (1a)
Ditto	In Nagri 3l (1a)
Act III of 1888 (Lepers)	In Urdu 6l (1a)
Ditto	In Nagri 6l (1a)
Act IV of 1888 (Indian Penal Code Amendment)	In Urdu 3p (1a)
Act V of 1888 (Code of Criminal Procedure), as modified up to 1st April, 1900	In Urdu R 1 l (5a)
Ditto	In Hindi R 1 0 (5a)
Act VI of 1888 (Post Office)	In Urdu 2l (1a)
Ditto	In Nagri 2a (1a)
Act IX of 1888 (Live stock Importation)	In Urdu 3l (1a)
Ditto	In Nagri 3p (1a)
Act X of 1888 (Indian Insolvency Rules)	In Urdu 3l (1a)
Act I of 1889 [Indian Marine Act (1887) Amendment]	In Urdu 6l (1a)
Ditto	In Nagri 6l (1a)
Act II of 1888 (Stamp) as modified up to 31st August, 1905	In Urdu 7a 6p (1a 6p)
Ditto	In Nagri 7a 6p (1a 6p)
Act III of 1880 (Prisoners) as modified up to 1st March, 1905	In Urdu 2l 3p (1a)
Ditto	In Nagri 2a 3p (1a)
Act IV of 1889 (Government Buildings)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act VII of 1889 [Indian Steam vessels Act (1884) Amendment]	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act VIII of 1889 (Petroleum)	In Urdu 9p (1a)
Ditto	In Nagri 9p (1a)
Act IX of 1899 (Arbitration)	In Urdu 9p (1a)
Ditto	In Nagri 9p (1a)
Act XI of 1889 (Court fees Amendment)	In Urdu 9p (1a)
Ditto	In Nagri 6p (1a)
Act XII of 1899 (Currency Notes Forgery)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act XIV of 1899 (Tariff Amendment)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act XVII of 1899 (Indian Registration Amendment)	In Urdu 3p (1a)
Ditto	In Nagri 3l (1a)
Act XVIII of 1899 (Land Improvement Loans Amendment)	In Urdu 3p (1a)
Ditto	In Nagri 3l (1a)
Act XX of 1899 (Presidency Banks)	In Urdu 3l (1a)
Ditto	In Nagri 3p (1a)
Act XXI of 1899 (Central Provinces Tenancy Amendment)	In Urdu 3l (1a)
Ditto	In Nagri 3p (1a)
Act XXIV of 1899 (Central Provinces Court of Wards)	In Urdu 1a 3p (1a)
Ditto	In Nagri 1a 3p (1a)
Act I of 1900 (Indian Articles of War Amendment)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act IV of 1900 [Indian Companies (Branch Reg'sters)]	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)

Act IX of 1900 (Amendment of Court-fees Act, 1870)	..	..	In Urdu, 3p (1a)
Ditto.			In Nagri 3p (1a)
Act X of 1900 (Census)	..	..	In Urdu 9p (1a)
Ditto			In Nagri, 9p (1a)
Act II of 1901 [Indian Tolls (Army)]	..	..	In Urdu 6p (1a)
Ditto.			In Nagri, 9p (1a)
Act III of 1901 (Indian Ports)	..	..	In Urdu, 3p (1a)
Act V of 1901 [Indian Forest (Amendment)]	..	..	In Urdu 3p (1a)
Ditto.			In Nagri 3p (1a)
Act VI of 1901 (Assam Labour and Emigration)	..	..	In Urdu 5a (2a)
Ditto.			In Nagri 5a (2a)
Act VII of 1901 (Native Christian Administration of Estates).			In Urdu 3p (1a)
Ditto.			In Nagri 3p (1a)
Act VIII of 1901 (Mines)	..	..	In Urdu 1a (1a)
Ditto			In Nagri 1a (1a)
Act IX of 1901	..	..	In Urdu 3p (1a)
Ditto			In Nagri 3p (1a)
Act X of 1901	..	..	In Urdu 3p (1a)
Ditto.			In Nagri 3p (1a)
Act II of 1902 [Cantonments (Housing-Accommodation)]	..		In Urdu 1a (1a)
Ditto.			In Nagri 1a (1a)
Act IV of 1902 (Indian Tramways)	..	..	In Urdu 3p (1a)
Ditto			In Nagri 3p (1a)
Act V of 1902 (Administrators General and Official Trustees)			In Urdu 3p (1a)
Ditto			In Nagri 3p (1a)
Act VII of 1902 [United Provinces (Designation)]	..	..	In Urdu 3p (1a)
Act VIII of 1902 (Indian Tariff)	..	..	In Urdu 3p (1a)
Ditto.			In Nagri 3p (1a)
Act II of 1903 [Indian Post Office (Amendment)]	..	..	In Urdu 3p (1a)
Ditto			In Nagri 3p (1a)
Act III of 1903 (Electricity)	..	..	In Urdu 2 1/2 6p (1a 6p)
Ditto			In Nagri 2 1/2 6p (1a 6p)
Act V of 1903 (Ports)	..	..	In Urdu 3p (1a) 2 1/2 (6p)
Ditto			In Nagri 3p (1a)
Act VII of 1903 (Works of Defence)	..	..	In Urdu 1a 3p (1a)
Ditto			In Nagri 1a 3p (1a)
Act VIII of 1903 (Probate and Administration)	..	..	In Urdu 3p (1a)
Ditto			In Nagri 3p (1a)
Act IX of 1903 (Tea Cess)	..	..	In Urdu 3p (1a)
Ditto			In Nagri 3p (1a)
Act X of 1903 (Victoria Memorial)			In Urdu 3p (1a)
Ditto			In Nagri 3p (1a)
Act XIII of 1903 (Leprosy)			In Urdu 3p (1a)
Ditto.			In Nagri 3p (1a)
Act XIV of 1903 (Indian Foreign Marriages)	..		In Urdu 3p (1a)
Ditto.			In Nagri 3p (1a)
Act XV of 1903 (Extradition), as modified up to 1st December, 1904	..		In Urdu 1a 8p (1a)
Ditto			In Nagri 1a 8p (1a)
Act I of 1904 (Poisons)	..	..	In Urdu 6p (1a)
Ditto			In Nagri 6p (1a)
Act III of 1904 (Local Authorities Loans)	..	..	In Urdu 3p (1a)
Ditto			In Nagri 3p (1a)
Act IV of 1904 (North-West Border Military Police)			In Urdu 9p (1a)
Act VI of 1904 [Transfer of Property (Amendment)]	..		In Urdu 1 1/2 (1a)
Ditto			In Nagri 1 1/2 (1a)
Act VII of 1904 (Ancient Monuments Preservation)	..	..	In Urdu 9p (1a)
Ditto			In Nagri 9p (1a)
Act VIII of 1904 (Indian Universities)	..	..	In Urdu 1a 3p (1a)
Ditto			In Nagri 1a 3p (1a)
Act X of 1904 (Co-operative Credit Societies)	..		In Urdu 1a (1a)
Ditto.			In Nagri 1a (1a)
Act XI of 1904 (to revive and continue section 8 B of the Indian Tariff Act, 1894)	..	..	In Urdu 3 1/2 (1a)
Ditto			In Nagri 3 1/2 (1a)
Act XII of 1904 (Emigration)	..	..	In Urdu 1 1/2 (1a)
Ditto.			In Nagri 1 1/2 (1a)
Act XIII of 1904 (Indian Articles of War)	..	..	In Urdu 1p (1a)
Ditto.			In Nagri 1p (1a)



Act XV of 1904 [Indian Stamp (Amendment)]	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act I of 1905 [Local Authorities Loan (Amendment)]	In Urdu p (1a)
Ditto	In Nagri 3p (1a)
Act II of 1905 [Indian Universities (Validation)]	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act III of 1905 (Indian Paper Currency)	In Urdu 9p (1a)
Ditto	In Nagri 9p (1a)
Act IV of 1905 (Indian Railway Board)	In Urdu 3p (1a)
Act VI of 1905 (Court Fees Amendment)	In Urdu 1a 6p (1a)
Ditto	In Nagri 3p (1a)
Act VII of 1905 (Bengal and Assam Laws)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Regulation I of 1890 (British Baluchistan Laws)	In Urdu 2s (1a 9p)
Regulation V of 1890 (British Baluchistan Forests)	In Urdu 2s (1a 6p)
Regulation VI of 1893 (Hazara Forests)	In Urdu 2s (1a 6p)
Regulation VIII of 1896 (British Baluchistan Criminal Justice)	In Urdu 9p (1a)
	In Urdu 2s 3p (1a)
	In Urdu 2s 6p (1a)
	In Urdu 6p (1a)
	In Urdu 4s 3p (1a)

### V—Miscellaneous Publications

Table showing effect of legislation in the Governor General's Council during 1898 to 1900	Re 1 (1a 6p)
Ditto during 1901	6s (2a)
Ditto during 1902	2s 6p (1a)
Ditto during 1903	1s (2a)
Ditto during 1904	4s (2a)
Ditto during 1905,	3p (1a)
Annual Indexes to the Acts of the Governor General of India in Council from 1854 to 1905 The price is not a shilling on each	
Report of Indian Law Commission 1879	Fools ap Boards Re 1 (5a)
Proceedings of the Council of the Governor General of India for making Laws and Regulations from July 1882 to 1905	Super royal 4to A usual subscription Rs 6 (Re 1) Single issue 4s includ g postage
Chronological Tables of the Indian Statutes compiled under the orders of the Government of India by F G WIGLEY of the Inner Temple Barrister at Law	1801 Edition Rs 4 (10a)
Index to Indian Statutes Chronological Tables and Index of the Indian Statutes compiled under the orders of the Government of India by F G WIGLEY of the Inner Temple Barrister at Law	Edition 1897 12s volumes 1s 12 (Re 1)
A Digest of Indian Law Cases containing High Courts Reports, 1862—1900 and Privy Council Reports of Appeals from India 1836—1900 with an Index of cases compiled under the orders of the Government of India by J V WOODMAN of the Middle Temple Barrister at Law and Ad vocates of the High Court Calcutta In six volumes Super royal 8vo Rs 72 for cloth bound and Rs 78 for quarter bound (Rs 3 12)	
Shipping in India,	Rs 5 (12a)
Acts in force in	Rs 18 (2a 6p)
Addenda and Corrigenda List No 1 of 1905 to the above	2s 6p (1a)
Index to Act V of 1899 (Indian Articles of War) as modified up to 1st January, 1895	7s (2a)
Contents to	In Urdu and Nagri 7s (2a)
Ditto	In Urdu and Nagri 1a 9p (1a)
	In Urdu 2s (1a 6p)
	In Urdu 3s 3p (1a 6p)
	In Urdu 9p (1a)
	In Urdu 2s 6p (1a)

1898

all of the Books and Pamphlets for sale which are less than two years old.

LEGISLATIVE DEPARTMENT.

[These publications may be obtained from the Office of the Superintendent of Government Printing,  
 11, Queen's Park, West, London, W.2.]

The Prices of the General Acts, Loc. I Codes, Merchant Shipping Digest, Index to Treatments and the Digests of Indian Law Cases, 1901 to 1907 (separately and per set of five volumes) have been considerably reduced.

The British Examinations in force in Native States were issued by the Foreign Department.

## I—The Indian Statute-Book.

11/11/68, L.A. 109.

*Super-royal £10, 40% altered.*

### C.—Local Codes.

The Bengal Code, Third Edition, 1905, contains all the Bengal and Local Acts in force in Bengal, Vol. I to V. It contains also the 1905 Amendment of Volume I.

The Bombay Code, Vol. I, Third Edition, 1907

Vol II

Vol III

The Code Code, Third Edition, 1908

The Coorg Code, Third Edition, 1908  
F. B. and Assam Code, Vol I, Edition 1907

Vol II

The United Provinces Code, Volume I, Fourth Edition, 1908, consisting of the Bengal Regulations and the Local Acts of the Governor General in Council; also in the United Provinces of Agra and Outh with a Chronological Table " " " " Rs. 6. (A)

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1906, by C. F. Gray, Darter at Law, and 1907.

II.—Reprints of Acts and Regulations of the Governor General of India in Council, as modified by subsequent Legislation.

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Act VI of 1878 (Treasure Trove), as modified by Act XII of 1891, as	2a, 9p (1a)
	6a (1a)
1909	Rs 153 (4a)
at June 1908	id up to 1st October
1907	1a 6p (1a)
Act IV of 1884 (Explosives), as modified up to 1st September 1908	6a (1a)
Act IV of 1889 (Indian Merchandise), as modified up to 1st August 1908	0a (1a)
Act VI of 1890 (Charitable Endowments), as modified up to 1st	
August 1908	2a 6p (1a)
Act XII of 1898 (Excise) as modified up to 1st March 1907	8a (2a)
Act II of 1899 (Stamps), as modified up to 1st March 1907	Re 1 (2a)
Act XIII of 1899 (Glanders and Farcy), as modified up to 1st February	
1908	2a 6p (1a)

### III—Acts and Regulations of the Governor General of India in Council as originally passed

Acts (unrepealed) of the Governor General of India in Council from 1906  
up to date

Regulations made under the Statute 33 Vict., Cap 3, from 1905 up to date

[The above may be obtained separately The price is noted on each]

### IV—Translations of Acts and Regulations of the Governor General of India in Council

Act XV of 1856 (Hindu Widows Re marriage)	In Urdu 6j (1a)
Ditto	In Nagri 6p (1a)
to 1st January 1905	In Urdu 1a (1a)
United Provinces)	In Urdu 1a (1a)
	In Urdu 2a (1a)
modified up to 1st March	
1908	In Urdu 3a 6p (1 6p)
Ditto	In Nagri 3a 6p (1a 6p)
	In Urdu 2 (1a)
	In Urdu 1a 6j (1a)
	ified up to 1st
	In Urdu 1a 6p (1a)
	to 1st October
Act XII of 1898 (Excise), as modified up to 1st March 1907	In Urdu 8a (1a 6p)
Ditto	In Urdu 7a 9p (2a)
Act XIII of 1899 (Glanders and Farcy) as modified up to 1st	In Nagri 8a 3p (2a)
February 1908	
Ditto	In Urdu 8p (1a)
Act I of 1906 [Indian Tariff (Amendment)]	In Nagri 9p (1a)
Ditto	In Urdu 8p (1a)
Act III of 1906 (Coinage)	In Nagri 9p (1a)
Ditto	In Urdu 9p (1a)
Act V of 1906 (Stamp Amendment)	In Nagri 9p (1a)
Ditto	In Urdu 3p (1a)
Act III of 1907 (Provincial Insolvency)	In Nagri 3p (1a)
Ditto	In Urdu 1a 6p (1a)
Act IV of 1907 [Repealing and Amending (Revenues and Cesses)]	In Nagri 1a 6p (1a)
Ditto	In Urdu 3p (1a)
Act V of 1907 (Local Authorities Loan)	In Nagri 3p (1a)
Ditto	In Urdu 3p (1a)
Act VI of 1907 (Prevention of Seditious Meetings)	In Hindi 3p (1a)
Ditto	In Urdu 3p (1a)
Act I of 1908 (Legal Practitioners)	In Hindi 3p (1a)
Ditto	In Urdu 3p (1a)
Act II of 1908 (Tariff)	In Urdu 3p (1a)
Act VI of 1908 (Explosive Substances)	In Urdu 3p (1a)
Act VII of 1908 (Prevention of Excitement to murder in Newspapers)	
Ditto	In Urdu 3p (1a)
	In Hindi 3p (1a)

### V—Miscellaneous Publications

Table showing effect of Legislation in the Governor General's Council	during 1906	3a 6p (1a)
Ditto	during 1907	2a 6p (1a)

## ORIGINAL CIVIL.

*Before Sir Lawrence Jenkins K C I E Chief Justice, and Mr. Justice  
Bachelor*

TEHILRAM GIRDHARIDAS, PLAINTIFF AND APPELLANT, v KASHIBAI,  
WIDOW, DEFENDANT AND RESPONDENT \*

1908.  
February 25

*Transfer of Property Act (IV of 1899) section 55, clause (4) (b) clause (6)  
—Vendor's lien for unpaid purchase money—Sale deed containing acknow-  
ledgment of receipt of consideration money in full—Mortgages taking the  
mortgage without notice of unpaid purchase money—Estoppel—Evidence Act  
(I of 1872), section 115*

In a registered sale deed of a chawl it was stated that the vendor had received consideration in full and there was also an acknowledgment of the vendor at the foot of the deed to the same effect. The vendor had also parted with all the title-deeds relating to the property. The vendor subsequently mortgaged the property to the plaintiff who had no knowledge that the full amount of the consideration money was not paid to the vendor though he knew that the vendor was in possession of some portion of the property,

*Held* that the defendant was estopped from contending that she had a lien on the chawl for the unpaid balance of the purchase money by her declaration as to the receipt of the whole purchase money and by her act in handing over the title-deeds.

*Per BACHELOR, J* —A vendor of immovable property who endorses upon the purchase deed a receipt for the purchase money cannot set up a lien for unpaid purchase money as against a mortgagee for value without notice under the purchaser.

ONE Mahomedali mortgaged to the plaintiff, by a registered deed dated 7th April 1904, a chawl for securing in trust for the person or persons who had accepted or discounted or would thereafter accept or discount at the plaintiff's request hundis, notes, etc., drawn or payable by the mortgagor for the aggregate sum not exceeding at any time the amount of Rs. 7,000.

The mortgagor handed to the plaintiff deeds and muniments of title relating to the said property including a registered deed of sale from the defendant to the mortgagor, dated 3rd April 1903. At the foot of this deed it was endorsed that the sum of

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LEHILRAM

v  
KASHIBAI

Rs 9,000 had been paid as consideration money by the mortgagor and received by the defendant in full.

The plaintiff demanded on the 12th May 1905 from the mortgagor the sum of Rs 6,450 3 6 for principal, interest and costs due by him and in default of payment gave notice that the plaintiff would exercise the power of sale reserved to him. No answer having been received from the mortgagor the plaintiff caused the chawl to be put up for sale by auction to be held on the 16th September 1905.

On 13th September 1905 the defendant for the first time intimated to the plaintiff that Rs 4 000 out of the consideration money still remained unpaid to her by the mortgagor and therefore called upon the plaintiff not to put up the said chawl for sale as the plaintiff's mortgage could not affect the defendant's rights and interests in the property.

The plaintiff alleged that he was a *bona fide* mortgagor for value without notice of the defendant's alleged lien and entitled to possession of the chawl under the mortgage deed, and that as the defendant knowing that the amount of the purchase money had not been received by her in full caused it to be falsely stated otherwise in the sale-deed and had also parted with all other title deeds relating to the said chawl, she was estopped from setting up her lien if any.

The plaintiff prayed for a declaration that he was entitled to sell the chawl under the mortgage deed free from any lien of the defendant, and for an order directing the defendant to deliver possession to the plaintiff of the said chawl including the four rooms therein in her personal occupation.

The defendant contended that the mortgage was a sham transaction, that the sale deed was not explained to her, that the vendee (the mortgagor) by a writing of even date agreed to pay to her the balance of the purchase-money, that she was in possession of the chawl in exercise of her right of lien as unpaid vendor, and the plaintiff was aware of her possession that she had obtained a High Court decree against the mortgagor for the amount of Rs 3,444 due to her, that she was fraudulently induced to part with her title deeds by the mortgagor alleging that they

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were necessary for the preparation of the deed of sale, that the suit was barred in law as under the mortgage deed the plaintiff was appointed a trustee on behalf of an uncertain class and the plaintiff had not obtained the leave of the Court to sue on behalf of that class, that the mortgagor was a necessary party to the suit. The defendant by way of counterclaim sought for a declaration that she as unpaid vendor had a lien on the chawl for the balance of the purchase money and that she was entitled to enforce her right by the sale of the said premises.

The Court (Macleod, J.) passed a decree in the defendant's favour and dismissed the suit with costs.

The plaintiff appealed.

*Strangman (with Rastles) for the appellant*

Macleod J., decided case on two points (1) that the so called mortgage was not a mortgage and the plaintiff did not take under the mortgage (2) that the plaintiff had notice of the defendant's lien for unpaid purchase money. See mortgage deed which says 'in respect of hundis bills or advances made through him the said Multani Thirum Girdharidas'. On this Macleod, J., has held that plaintiff was only a volunteer and not a secured creditor. The learned Judge relied on *Wallwyn v. Coult's* (1) and *Garrard v. Lord Linsdale* (2), but the facts in these two cases are different from those here. Plaintiff is himself interested in the mortgage deed and is also liable to others and is not a mere volunteer. See *Siggers v. Evans* (3). 'Through him' would include loans made by the plaintiff the plaintiff guarantees the payment back of the loans.

The plaintiff had no notice of lien as required by Transfer of Property Act section 55 cl 4 (b). *Webb v. Macpherson* (4), which is relied on by them is not applicable because the question of estoppel arises. See *Kennedy v. Green* (5).

Macleod J., has held that defendant's possession of the mortgaged property was in itself constructive notice to the plaintiff.

(1) (1816) 3 Mer 707

(2) (1830) 3 S. 1

(3) (1855) 5 El. & Bl. 367.

(4) (1903) L. R. 30 I. A. 235

(5) (1834) 3 Myl. & K. 699

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v  
KASHIBAI

of defendant's claim This is not so see *White v Wakefield*<sup>(1)</sup> She might have been in possession as a tenant of the purchaser, possession in such a case would mean nothing This story about notice is never set up in correspondence before we come to Court. See Lord Cairn's judgment in *Shropshire Union Railways and Canal Company v. The Queen*<sup>(2)</sup>

*Mirza (Setalvad with him) for the respondent.*

The plaintiff is a trustee on behalf of the creditors The assignee cannot stand in a better position than the assignor, none of the creditors of the mortgagors were privy to the mortgage deed see *Johns v. James* <sup>(3)</sup>.

On the question of notice we say the plaintiff had constructive notice of our lien see *Wigram, V C.*, in *Jones v Smith*<sup>(4)</sup>, *Alderson B.* in *Whitbread v Jordan* <sup>(5)</sup>, *West v Reid* <sup>(6)</sup>, *Doorga Narain Sen v. Baney Madhub Mozoomdar* <sup>(7)</sup>, *Golind Chunder Mookerjee v Doorgapersaud Baboo* <sup>(8)</sup>.

Possession has the effect of notice *Kondiba v Nana* <sup>(9)</sup> If there is notice no question of estoppel can arise

*Raihes in reply*

JENKINS, C. J.—On the 7th of April 1904 Mahomedali Abdul Husein Goriawalla executed in favour of the plaintiff a mortgage of immoveable property in Bombay, and the purpose of this suit is to restrain the defendant from interfering with the exercise by the plaintiff of the power of sale contained in the mortgage deed The interference is admitted, and is sought to be justified by the defendant on the ground that she has a charge on the mortgaged property under section 55 (4) (b) of the Transfer of Property Act.

Macleod, J., has passed a decree in the defendant's favour and dismissed the suit with costs The plaintiff now appeals from that decree The charge claimed by the defendant is in respect of unpaid purchase money due under an instrument of transfer

(1) (1835) 7 S. n. 401

(2) (1873) L. R. 7 H. L. 496 at p. 510

(3) (1878) 8 Ch. D. 743

(4) (1811) 1 H. 13

(5) (1835) 1 Y. & Coll. 303 at p. 323

(6) (1813) 2 H. 249.

(7) (1887) 7 Cal. 199

(8) (1874) 22 W. R. (Civ. Rul.) 218

(9) (1903) 27 Bom. 408.

executed by her in favour of Mahomedali, the plaintiff's mortgagor, on the 3rd of April 1903, whereby the ownership of the mortgaged property passed to Mahomedali as the buyer.

The actual consideration named in the instrument of transfer was Rs 9,000, but of this only Rs. 4,000 was paid at the time. By an agreement of even date Mahomedali agreed to pay [the balance within one year, and it was thereby provided as follows : "In case I" (that is Mahomedali) "or my heirs sell the said premises in question and mentioned in the said coaveyance the said vendor should at once attach the sale-proceeds of the said premises and recover the balance out of it" A part of this balance is still unpaid.

The points urged by the defendant are, first, that she has a charge under section 55 of the Transfer of Property Act : secondly, that under the mortgage deed the plaintiff has no right to sell the property : and, thirdly, that if he has that right, it is subject to the charge in the defendant's favour

I will first consider whether the plaintiff has a right to sell the property under the mortgage deed.

The circumstances that led up to the mortgage are indicated in the recitals, which run as follows :—

This indenture made the 7th day of April in the Christian year one thousand nine hundred and four between Mahomedali Abdul Husein Goriawalla of Bombay Vorah Mahomedan inhabitant of the one part and Multani Tahliram Girdharidas of Bombay Hindu inhabitant of the other part whereas the said Mahomedali Abdul Husein Goriawalla is seized of or otherwise well and sufficiently entitled to the hereditaments and promises hereinafter more particularly described and intended to be hereby granted for an estate of inheritance in fee simple in possession free from incumbrances and whereas the said Multani Tahliram Girdharidas is a broker and has been for some time past procuring loans of money from several persons to the said Mahomedali Abdul Husein Goriawalla hundi drawn or payable by him and other negotiable instruments and on personal security and whereas the said Multani Tahliram Girdharidas has up to the date of these presents procured various loans of money to him the said Mahomedali Abdul Husein Goriawalla from different persons some of which have been paid off by the said Mahomedali Abdul Husein Goriawalla and that a balance of Rs. 6,200 now remains due and owing by the said Mahomedali Abdul Husein Goriawalla on account thereof and whereas it has been agreed by and between the parties hereto that in consideration of the said

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Multanī Tahilram Girdharidas procuring such loans from time to time which loans shall not in any case exceed in aggregate Rs 7,000 at any time the said Mahomedali Abdul Husein Goriawalla should as a security for such loans execute a mortgage of the said hereditaments and premises for the said sum of Rs 7,000 to the said Multanī Tahilram Girdharidas for the use and benefit of the person or persons who have already been or may or shall hereafter be procured by him the said Multanī Tahilram Girdharidas to make such loans to him the said Mahomedali Abdul Husein Goriawalla to the extent of the said sum and in manner hereinafter appearing now this Indenture witnesseth that in pursuance of the said agreement and consideration of the premises the said Mahomedali Abdul Husein Goriawalla doth hereby for himself his heirs executors and administrators covenant with the said Multanī Tahilram Girdharidas his heirs executors administrators and assigns that he the said Mahomedali Abdul Husein Goriawalla his heirs executors or administrators will on demand made to him or them or left at the place of his or their business pay to the said Multanī Tahilram Girdharidas his heirs executors administrators or assigns the balance which shall for the time being be owing by him the said Mahomedali Abdul Husein Goriawalla his heirs executors or administrators in respect of hundis bills notes or drafts accepted paid or discounted or loans or credits or advances made through him the said Multanī Tahilram Girdharidas to or for the use or accommodation or at the request of the said Mahomedali Abdul Husein Goriawalla and for interest commission or otherwise in trust for the person or persons his or their heirs executors administrators and assigns who have hitherto accepted paid or discounted or may or shall hereafter accept pay or discount such hundis bills notes or drafts or who have made or may or shall thereafter make such loans credits or advances as aforesaid as his or their own proper moneys in proportion due to him or them respectively and to be assigned and disposed of as he or they shall direct

Then Mahomedali covenanted to pay to the plaintiff the balance for the time being owing by him, Mahomedali, in respect of hundis, bills, notes or drafts accepted, paid or discounted or loans or credits or advances made through him the said Multanī Tahilram Girdharidas to or for the use or accommodation or at the request of the said Mahomedali Abdul Husein Goriawalla and for interest, commission or otherwise in trust for the person or persons, his or their heirs, executors, administrators and assigns who have hitherto accepted, paid or discounted or may or shall hereafter accept, pay or discount such hundis, bills, notes or drafts or who have made or may or shall thereafter make such loans, credits or advances as aforesaid as his or their own proper moneys in proportion due to him or them respectively and to be assigned and disposed of as he or they shall direct."

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The transfer of the property is expressed to be to the plaintiff 'in trust for the person or persons his or their heirs, executors and assigns who have hitherto accepted or paid or discounted or may or shall hereafter accept or pay or discount the said hundis bills or notes or drafts or who have made or may or shall hereafter make the loans credits or advances through the said Multani Tihilram Girdharidas as aforesaid and whichever moneys shall for the time being remain due and owing in respect thereof

And then the trusts of the sale proceeds are expressed to be after payment of costs and expenses to pay and satisfy the money then owing on the security of the mortgage-deed

The defendant contends that the deed is voluntary and that there is no one who can claim the benefit of it

The plaintiff on the other hand claims that he is entitled to the benefit of the security created by the mortgage deed, and he makes out his claim as follows

He says that at the institution of the suit there was and that there still is a sum of Rs 5700 with interest due on the security of the deed. This amount is made up of Rs 3,700 and Rs 2,000. The sum of Rs 3,700 represents two notes for Rs 2,500 and Rs 1,200 and the sum of Rs 2,000 represents two hundis for Rs 1,000 apiece, all discounted through the plaintiff as contemplated by the mortgage deed. These notes and hundis were not met by Mahomedali at maturity, and the holders were paid by the plaintiff, who took from Mahomedali promissory notes for the amounts paid by him.

But if the notes and hundis paid by the plaintiff come within the terms of the mortgage deed then the plaintiff can in my opinion claim the benefit of the security. The evidence shows that the notes and hundis were discounted on the plaintiff's assurance and the conclusion to which I come is that he guaranteed repayment. The notes and hundis have been produced by him and there can (in my opinion) be no doubt that he held them by way of security for the amount paid by him. Moreover, it appears that by the circulation of the special

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endorsements two of these instruments are endorsed in blank and are so held by the plaintiff

The conclusion to which I came is that the plaintiff on the payments made by him became entitled to the benefit of the security created by the mortgage deed, and that by taking promissory notes from Mahomedali for the amounts paid by him he did not intend to abandon and in fact did not give up this security

The learned Judge considered that *Wallwyn v. Coutts* <sup>(1)</sup> and *Garrard v. Lord Lauderdale* <sup>(2)</sup> furnished an answer to the plaintiff's claim, but in my opinion they do not in any way govern the present case, and it cannot be said that the mortgage-deed was a voluntary trust deed. The recitals show what the consideration was loans were procured by the plaintiff in accordance with what was contemplated and one of those by whom money was paid has stated in evidence that the plaintiff told him that he had got a deed

Moreover, the facts as to the Rs 6,200 mentioned in the recitals show that the deed was not even in its inception voluntary. There can be no doubt that it was intended to secure this sum. But of this amount Rs 3,400 had actually been paid at that date by the plaintiff in respect of hundis or notes on which Mahomedali was liable and of this Mahomedali must have been aware inasmuch as he had given the plaintiff a note for the amount

This also serves to show that it was the intention of the parties that the plaintiff was to have the benefit of the security for all amounts subsequently to be paid by him in discharge of Mahomedali's liability to those who had discounted notes or hundis for him through the plaintiff

If the plaintiff is, as I hold, entitled to the benefit of the mortgage it is not disputed that the power of sale is exercisable so it only remains for me to deal with the defendant's contention that the power can only be exercised subject to the charge in her favour in respect of unpaid purchase money

(1) (1815) 3 Mer 707

(2) (1830) 3 Sim 1

Section 55 (4) (b), on which the defendant relies, is in these terms —

‘ The seller is entitled—where the ownership of the property has passed to the buyer before payment of the whole of the purchase money, to a charge upon the property in the hands of the buyer for the amount of the purchase money, or any part thereof remaining unpaid and for interest on such amount or part

Notwithstanding the difference between the language of this sub-section and that of sub section 6, I will assume that the defendant, under section 55 (4) a seller, has a charge upon the property transferred not only in the hands of the buyer, but also of one who claims under the buyer, and that the decision in *Webb v Macpherson*<sup>(1)</sup> did not turn on the special circumstances of that case

But is not the defendant estopped from relying on the facts necessary to the establishment of her charge ?

Section 115 of the Evidence Act provides that

‘ When one person has, by his declaration act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing

In the instrument of transfer of the 3rd of April 1903 executed by the defendant to Mahomedali it is stated that the consideration of Rs 9,000 had been paid on or before the execution of the instrument, and endorsed on it was a receipt for this amount signed by the defendant, and the title deeds in the defendant's possession were delivered to the buyer

The plaintiff has sworn that if he had known the purchase-money of the property had not been fully paid up he would not have taken the mortgage, and in the mortgage it is recited that Mahomedali was seized of the property free from incumbrances

Why then should not the defendant be estopped by the statement in the deed and the endorsement and her act of handing over the title-deeds ?

(1) (1903) L R 30 I A 233 at p 244, 5 Bom L R 833.

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If the plaintiff knew the true facts then he would not be entitled to rely on section 115, but on the evidence I hold it is not proved that in fact he had such knowledge. In the correspondence before suit it is distinctly said that the first intimation to the plaintiff of the defendant's claim was her attorney's letter of the 13th of September 1905 (see letter of the 16th September 1905), and this statement was not questioned.

The plaintiff in his evidence by implication denies knowledge of non-payment of the purchase money and the learned Judge does not find that he had this knowledge. All he does hold is that the defendant was aware of circumstances in connection with the defendant's claim which put him on inquiry before the mortgage was executed to ascertain whether Mahomedali was in possession or not, and that having made no inquiry of any sort he cannot now be said to be a mortgagee without notice of her claim. What these circumstances are does not appear from the judgment but all it comes to is that he ought to have made enquiries as to the mortgagor's possession, and failure in this respect deprives him of saying that he is a mortgagee without notice of her claim. It is argued that the learned Judge has found that the plaintiff had notice within the definition contained in section 3 of the Transfer of Property Act. But that does not appear from his judgment: the issue on which the defendant relies is the 20th, but that falls short of the requirements of the section, and I can discover nothing in any part of the judgment which amounts to a finding of actual knowledge, wilful abstention or gross negligence as required by section 3.

And on a consideration of the evidence I hold that no case within that section has been established, so that it is unnecessary to consider whether anything short of actual knowledge would disentitle the plaintiff from relying on section 115 of the Evidence Act.

Much reliance has been placed on the evidence of Moresbhai Yeshwant, N. F. Creado and Anandrao Ramchandra. Moresbhai's evidence is directed in showing that the plaintiff must have learnt of the claim on the 28th of February 1904, about five weeks before the execution of the mortgage.

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One naturally asks how could he in September 1907 have remembered that the plaintiff was present at a conversation between him and Mahomedali on the 28th of February 1904 over three and half years before. The date was evidently obtained from the endorsement of payment, and the witness' version in examination in chief was that the plaintiff had found the money. If that had been true there would have been a reason for the witness' recollection of the circumstance. But the plaintiff denies the incident, and it was not suggested to him that he had made any entry of the Rs. 130 said to have been found by him on that occasion. Before us the plaintiff's books were produced for examination by the defendant's advisers with the result that no trace could be found in them of any such payment having been made. I do not believe that the Rs. 130 was found by the plaintiff, and that being so I am unable to attach any value to Moresbwar's story of the 28th of February.

Creado too speaks to this same day, but I am equally unable to believe his story. He is more cautious than Moresbwar, because he does not commit himself to the statement that the plaintiff found the money. But how he comes to remember the plaintiff's presence on that occasion I cannot understand and it would not be safe to rely on his evidence for the purpose of bringing home to the plaintiff knowledge that the purchase money had not been paid.

Anandrao's evidence, if it means anything, means that the plaintiff had actual knowledge a comment which applies to the evidence of the two witnesses I have already discussed. But it is clear that the learned Judge did not believe actual knowledge was brought home to the plaintiff, the furthest he goes is to hold that the plaintiff was aware of circumstances in connection with Kashibai's claim which put him on inquiry to ascertain whether Mahomedali was in possession or not and that having made no inquiry of any sort he cannot now be said to be a mortgagee without notice of the claim. This appears to me to mean that he ought to have made enquiry, and if he had done so, then he would have had actual knowledge. I think the learned Judge went to the furthest limit possible, and I certainly will go no further, for Anandrao's evidence as well as that of

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Moreshwar and Creado fails to convince me that the plaintiff knew that the facts stated in the receipt and implied by delivery of the title-deeds were untrue.

No reliance has been placed on the other evidence of knowledge which has been disbelieved by Macleod J., therefore, I need not discuss it

Then Mr Mirza has urged on behalf of the defendant that the learned Judge has found against estoppel, and we, therefore, ought not to disturb his finding

The issue framed on this point is "whether the allegations in para 7 of the plaint are true" The case of estoppel is made in that para and the finding of the learned Judge is in the negative But nowhere does he discuss the matters to which I have referred and I am unable to see that he has come to any definite finding on the facts necessary to the determination of this question.

The conclusion to which I come is that the defendant by her declarations as to receipt of the whole purchase money and her act in delivering to the buyer the title deeds intentionally caused the plaintiff to believe it to be true as recited in the mortgage that Mahomedali was seized of the property in fee simple in possession free from incumbrances so far as she was concerned, and that the plaintiff acted on that belief.

It follows, therefore, that the defendant cannot be allowed in this suit to deny the truth of this.

The decree of the first Court must, therefore, be reversed and a decree must be passed making a declaration in the terms of prayer (a) to the plaint, granting an injunction restraining the defendant from asserting, continuing or insisting on her objection so as to prejudice the exercise by the plaintiff of his power of sale and from interfering with the plaintiff's exercise of his power of sale contained in the mortgage deed

There will also be a decree for possession in the terms of prayer (c) and the respondent must pay the plaintiff his costs of the suit and appeal and the plaintiff will be entitled as against the defendant to add his costs to the mortgage security.

Interest on the mortgage must be calculated for the purpose of this decree at six per cent

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**BATCHELOR J** —On 3rd April 1903 the property in suit was sold by the defendant to one Mahomedali Abdul Husein for Rs 9 000 and a receipt for the full sum was endorsed on the deed by the defendant. In fact, however, only Rs 5 000 had been paid and the balance of Rs 4 000 remained due by Mahomedali to the defendant. On 7th April 1904 the property was conveyed by Mahomedali under an instrument which the plaintiff describes as a mortgage deed in his favour. Thus the present controversy is between the plaintiff as mortgagee and the defendant as mortgagor's vendor. The learned Judge below has dismissed the plaintiff's suit upon two grounds, namely, first, that the plaintiff was affected with notice of the defendant's charge as unpaid vendor, and, secondly, that the so called mortgage deed was a mere voluntary instrument of trust in favour of unspecified creditors and gave the plaintiff no beneficial interest. The plaintiff appeals, and the judgment of the Court below is attacked on both the grounds on which it was based.

Dealing first with the character of the deed of 7th April 1904, Exhibit B, we find that the learned Judge was of opinion that it fell within the class of instruments discussed in *Wallwyn v Coultts*<sup>(1)</sup> and *Garrard v Lord Lauderdale*<sup>(2)</sup> being merely a revocable settlement in favour of creditors. I am inclined to doubt whether decided cases are of very much direct assistance in this appeal which must be determined in accordance with the true meaning of the particular deed Exhibit B, but if reference to authorities be desirable it seems to me that the deed here approximates more closely to that considered in *Siggers v Fians*<sup>(3)</sup> than to that dealt with in *Garrard v Lord Lauderdale*<sup>(4)</sup>.

But I think that this deed should be construed upon its own terms in the light of the actual relation there shown to have been existing between the parties, and it may be well to recall the direction of the Privy Council in *Hunoomanpersaud's* case<sup>(5)</sup>

(1) (1815) 3 Mer. 67.

(2) (1830) 3 Sm. 1.

(3) (1855) 5 El. &amp; Bl. 367.

(4) (1856) 6 Moo. T. A. 393 at p. 411.



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that "deeds and contracts of the people of India ought to be liberally construed. The form of expression, the literal sense, is not to be so much regarded as the real meaning of the parties which the transaction discloses."

Now the deed on its face purports to be a deed of mortgage for the purpose of securing a sum of Rs 6,200 due on loans already procured by the plaintiff and any further sum up to a limit of Rs 7,000 which the plaintiff may procure as advances to the mortgagor. It is true that the plaintiff is not referred to as the person *by* whom, but only as the person *through* whom the moneys are to be advanced, but it is proved, though proof was hardly needed beyond the internal evidence, that the deed was drawn by an inexperienced clerk, and it appears further that the Rs 6,200 were then treated as owing to the plaintiff, partly on outstanding *kundis* and partly on promissory notes executed by Mahomedali. It is the fact that this particular sum of Rs 6,200 has since been paid off, but a further liability of Rs 5,000 has been incurred by Mahomedali towards the plaintiff in respect of *kundis* which the plaintiff has met on behalf of Mahomedali who has given promissory notes for the amount. The deed purports to be a security for all persons who may accept pay or discount any *kundis*, bills, notes or drafts or make loans, credits or advances to Mahomedali. I agree with Mr Rames that it would be a harsh construction to exclude the plaintiff who was the only creditor when the deed was executed and who is a creditor still in respect of such payments as the mortgage contemplated. Unless the deed be read with an abstract technicality which in my opinion would be inappropriate, there is nothing in it which debars the plaintiff from making the advances himself, and, having done so, from claiming the benefit of the security. There was ample consideration moving from the plaintiff, and the deed was clearly not one which it lay within Mahomedali's power to revoke. I am of opinion that the plaintiff as creditor is entitled to claim the benefit of this security. Though promissory notes were taken from Mahomedali there is nothing to suggest that the plaintiff intended to abandon the security of the mortgage, indeed the evidence shows that he had no such intention.

The same result follows if we have regard to the plaintiff's position as surety under section 141 of the Indian Contract Act. For the evidence shows that the *kundis* now in question were paid by the firms of Wadhnam and Ussarali on the assurance of the plaintiff, and that, upon their being dishonoured subsequently the plaintiff made good the amounts to the holders on behalf of Mahomedali. If, then, these holders would be entitled to the benefit of the security furnished by Exhibit B—and that, I understand, is not denied—the plaintiff, who has paid them off, becomes similarly entitled in their place. I may add that, despite certain phrases to which Mr. Mirza has called our attention in the account entries Exhibits J and K, I am of opinion on the evidence that these moneys were paid by the plaintiff, who is shown to have referred at least in the presence of one of the shroffs, to the mortgage deed as his security. It is suggested that the plaintiff put forward no claim as surety in the Court below, but the judgment of Macleod, J., clearly indicates that the point was mentioned and discussed before him.

Then there is the question whether the plaintiff's claim under the mortgage should be postponed to the charge over the property which is given by sub section (1) (b) of section 55 of the Transfer of Property Act. The section gives the charge over the property 'in the hands of the buyer,' but for the purposes of this case we may assume, though the point is by no means clear, that in *Webb v Macpherson* <sup>(1)</sup> it was intended to decide that the charge was extended to persons claiming through the buyer. Even upon this construction the defendant is not, I think, entitled to rely upon her charge as against the plaintiff, for she is estopped from doing so under section 115 of the Evidence Act by reason of the receipt for the full purchase money which she endorsed upon the deed of sale. That was a declaration by the defendant which intentionally caused the plaintiff to believe that the entire price had been paid and to act upon that belief. The declaration was made "intentionally" within the meaning of the section, as the word has been explained in *Sarit Chunder Dey v Gopal Chunder Laha* <sup>(2)</sup>, that is the declaration was so made that a

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(1) (1903) L. I. 10 I. A. 238 5 B. & L. R. 832 (2) (1902) 20 Cal. 290.

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reasonable man would take it to be true and believe that it was meant that he should act on it; and the evidence proves that in fact the plaintiff did believe the representation to be true and did act upon it. In my opinion, therefore, the defendant is estopped from relying upon this charge. Though the statutory charge given to the seller in India differs from the unpaid vendor's lien under English Law, it may be observed that the conclusion I have reached as to the effect of estoppel is consistent with the English decisions which have held that a vendor of immoveable property who endorses upon the purchase-deed a receipt for the purchase-money cannot set up a lien for unpaid purchase-money as against a mortgagee for value without notice under the purchaser. See *Rice v. Rice*<sup>(1)</sup>. And as against a clear estoppel, such as we have here, I can see no reason to suppose that the statutory charge occupies any higher position than the unpaid vendor's equitable lien in England.

As to the argument that the plaintiff should be affected with notice of the defendant's charge, I am clearly of opinion that it must fail.

Under section 3 of the Transfer of Property Act the plaintiff can be said to have had notice only if he had actual knowledge, or if he wilfully abstained from inquiry or if he was guilty of gross negligence. It is plain from the evidence that actual knowledge of the defendant's charge cannot be said to have been possessed by the plaintiff and that apparently is the finding of the learned Judge. But the Judge has held that plaintiff was aware of circumstances which should have put him on inquiry and that, since he made no inquiry, he must be affected with notice. But, in the first place, it seems to me that the plaintiff was not bound to make inquiry, but was entitled to rely upon the representation in the sale-deed: see *Redgrave v. Hurd*<sup>(2)</sup>. Then I find difficulty in ascertaining how far the learned Judge did in fact believe the witnesses called for the defendant on this point. He says plainly that in his opinion it is quite possible that they have made additions to their story which are not founded upon facts, but in the main he finds that they were

(1) (1853) 2 Drew. 73.

(2) (1881) 20 Ch. D. 1.

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telling the truth. But it is in the main that he has disbelieved them, for the point of their story is that the defendant had actual knowledge. If that be disbelieved, I think it is impossible to give effect to the other vague evidence given after a lapse of over three years by witnesses who had no special reason to recollect the commonplace events in question and who were not free from the imputation of being interested in the cause. It should be observed further that the allegation now under consideration was not made against the plaintiff until a very late stage, and the evidence on which it is now sought to be supported is, in my opinion, insufficient. I, therefore, come to the conclusion that it cannot be said that the plaintiff was guilty either of wilful abstention from inquiry or of gross negligence. It follows that his claim under the mortgage is not subject to the defendant's charge. The decree of the Court below must, therefore, be reversed and there must be a decree in the terms stated by the Chief Justice.

*Decree reversed.*

Attorneys for the appellant *Messrs Jehangir, Gulabhai and Bilimoria*

Attorneys for the respondent *Messrs Mir, Merza & Mangaldas*

D. N. I

## ORIGINAL CIVIL

*Before Mr Justice Beaman*

BUKHHANBAI PLAINTIFF, v. ADAMJI SHAIK RAJBHAI AND OTHERS,  
DEFENDANTS \*

1200

of 1908

*Suit for administration—Reference to Commissioner—Parties agreeing orally to submit to Commissioner's decision—Commissioner's award—Civil Procedure Code (Act XII of 1897) s 37—Adjustment of suits which is—Written submission necessary*

The parties to an arbitration suit consented to it being referred to the Commissioner to take the usual accounts and to determine their respective shares. In the usual course, the matter came before the Commissioner for taking accounts and a large mass of accounts, objections &c. &c.

\* Suit No 77 of 1906.

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charges were filed by the various parties. On appearing before the Assistant Commissioner the parties came to an understanding that the matter in dispute should be left to be decided by the Assistant Commissioner in a summary manner without going into formal evidence beyond the accounts, objections and surcharges filed before him. The 1st and 6th defendants with their attorney were present at this meeting and after their attorney had agreed to the above course suggested by the Assistant Commissioner, the Assistant Commissioner himself explained to the 1st and 6th defendants in turn his proposal and told them that whatever award he made would be binding on them. To this they agreed, the 1st defendant even saying he would take one rupee if that was the sum awarded to him. It was also agreed that the Assistant Commissioner should draw up his findings in the form of a consent decree to be taken by the parties as that would save the parties a large sum in costs. At another meeting before the Assistant Commissioner the latter recorded his findings and then proceeded to draw up the consent decree embodying these findings therein but the defendants 1 and 6 refused to be bound by his decision. Upon application being made by the plaintiff that an adjustment of the suit might be recorded under section 375 of the Civil Procedure Code on the basis of the Assistant Commissioner's decision

*Held*, that there had been no adjustment of the suit. There had been no written submission to arbitration as provided by section 4 of the Indian Arbitration Act, and, consequently, there had been no legal and valid reference to arbitration and the Assistant Commissioner's award (for it really was an award and nothing else) had no legal foundation and could therefore have no legal consequences. As there had been no reference to arbitration and no award there could be no adjustment to give effect to under section 375 of the Civil Procedure Code.

*Samsiba v. Premji Praggi*(1) and *Pragdas v. Girdhardas*(2) considered and distinguished.

THE facts of this case appear sufficiently from the headnote and judgment.

*Strangman* for plaintiff.

*Davar* for defendant 2.

*Chamier* for defendants 1 and 6.

BEAMAN, J.—This was an administration suit—a decretal order was passed referring it to the Commissioner to take the usual accounts. When the matter came before the Assistant Commissioner Mr. Modi, it appears from his notes (the substantial correctness of all the facts contained in which is not disputed) that

(1) (1895) 20 Bom 304

(2) (1901) 26 Bom 70

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with the object of saving parties considerable delay and expense he proposed that they should leave the settlement of all matters in dispute between them in his hands. All the parties consented. From Mr Modi's record, it is clear that they then agreed unreservedly and without any qualification to allow him to deal summarily with all the disputed matters and to draft (as he calls it) a decree by which they were to be finally bound. He says he fully explained every term of this proposal to the parties and in particular impressed upon the defendants that even should his decree award them no more than a rupee they were to be bound by it. To these terms all the parties assented. Thereupon Mr Modi made what he calls a draft decree. Mr Strangman for the plaintiff and defendant No. 4 now moves the Court to confirm this report and give a decree in its terms. Defendant No. 6 represented by Mr Chamier objects on the ground as I understand him that the principle upon which Mr Modi has arrived at his conclusion is incorrect and not a principle upon which he (the sixth defendant) thought he would act. When the motion came on Mr Strangman asked the Court to record Mr Modi's report as an adjustment, compromise or satisfaction of the suit under and within the meaning of section 375 of the Civil Procedure Code and thereon pass a decree in accordance therewith. To this Mr Chamier objected that he had received no notice of any such application, that he was entitled to notice, and that not having been given notice, this application could not now be proceeded with.

It appears, however that the suit was down on the board for passing a final decree in terms of the Assistant Commissioner's report, and I am not disposed to defer my decision upon what is substantially in issue in order to give effect to this technical objection. Mr Strangman for the plaintiff strongly relies on the cases of *Samibai v. Premji Praggi* (1) and *Pragdas v. Girdhardas* (2). The latter case was decided in appeal by Sir Lawrence Jenkins O. J., and Starling, J. There the suit was for dissolution of partnership and accounts. The suit was called on for hearing on the 21st February 1899 and by consent a decretal order

(1) (1894) 20 Bom. 504.

(2) (1901) 26 Bom. 76.

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was made referring it to the Commissioner to take the accounts. On the 31st March 1899 before any accounts were brought into the Commissioner's office the parties referred the subject matter of the suit to arbitration and on the 28th of June 1900 the arbitrators made their award. On the 7th December 1900 the plaintiffs gave notice that they would move in Court, that the agreement and the award be recorded under section 375 of the Civil Procedure Code. A decree was passed accordingly on the 13th December 1900 in which the submission and the award were recorded under the said section and the terms of the award were embodied in it. The Appeal Court held that the reference and the award constituted an adjustment of the suit by a lawful agreement or compromise and upon that ground upheld the decree of the Court below. Their Lordships referred with approval to the case of *Samibai v Premji Pragnji*<sup>(1)</sup> which had been decided in the same way and upon the same principle by Starling, J., on the Original Side of the High Court. It is certainly not easy to distinguish the principle of those decisions from the principle upon which Mr Strangman now asks me to act. And were I satisfied that no distinction could be drawn, notwithstanding that in some points the conditions of those cases and this case are different I should feel myself bound by those decisions. After having carefully studied not only those cases but many others dealing with the same question decided in the other High Courts, while I must admit that the weight of authority is heavily on the plaintiff's side I feel very grave doubts as to some parts at least of the reasoning upon which many of those decisions rest. Reference was made in *Pragdas v Girdhardas*<sup>(2)</sup> to the Full Bench case of *Brojodurlabh Sinha v Ramanath Ghose*<sup>(3)</sup>, where although the decisions of the majority were substantially in accord with the view taken by Starling, J., in *Samibai v Premji Pragnji*<sup>(4)</sup> O'Kinealy J., in his dissenting judgment, doubted the correctness of that decision. For my own part speaking with all respect to the eminent Judges who have adopted the contrary opinion, I think that that Judge's doubt was well founded. Again Jenkins,

<sup>(1)</sup> (1895) 20 Bom 301<sup>(2)</sup> (1901) 23 Bom 78<sup>(3)</sup> (1897) 21 Cal 208

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C J, says ' that the decision in *Sunbat v. Premji Prags*<sup>(1)</sup> has met with the approval of Farran, C J, in *Ghellaabhai v. Nandubhai*<sup>(2)</sup> ' The passage referred to however is merely an *obiter dictum*. So, too, in the case of *Lakshmana Chetty v. Chinnalkhambi*<sup>(3)</sup> in which Sir Lawrence Jenkins says that Mr Justice Starlings view, if not affirmed, certainly was not rejected, the most that can be said is that the Judges there in an *obiter dictum* seem to have approved of it. It is perhaps worth noting that the submission to arbitration in *Pragdas v. Girdhardas*<sup>(4)</sup> was made before the Indian Arbitration Act had come into force. I do not myself think that that circumstance materially affects what seems to me the fundamental principle of the decision. The learned Chief Justice says "First it is said that Chapter 37 of the Civil Procedure Code, 1882, is an exhaustive exposition of the power to refer to arbitration pending a suit. I can find nothing however, in Chapter 37 which invalidates a proceeding not in accordance with its provisions beyond the result that non compliance deprives a party of a right to claim the consequences the Chapter prescribes' And I apprehend that the same process of reasoning would apply to any submission to arbitration which does not comply with the requirements either of Chapter 37 of the Civil Procedure Code or of the Indian Arbitration Act IX of 1899. But it seems to me that where a special procedure is provided for extraordinary extra judicial methods of settling disputed claims, it must have been the intention of the legislature that that procedure and no other was to be followed. To say that Chapter 37 was not, before the passing of the Indian Arbitration Act an exhaustive exposition of the powers to refer to arbitration and that a reference to arbitration not made in accordance with its provisions might nevertheless be given much more speedy and peremptory effect to by bringing it in under section 375 for the reason that "non compliance deprives a party of a right to claim the consequence the chapter prescribes"—seems to me, speaking with the greatest respect, a questionable proposition. Because the reason advanced to support it will when closely examined, become, I think, quite inadequate. What is

(1) (1895) 20 Bom. 304

(2) (1896) 21 Bom. 335

(3) (1900) 24 Mad. 305

(4) (1901) 26 Bom. 76.



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implied in it is that by not complying with the statutory provisions regulating submission to arbitration, the worst that can befall a party so failing to comply is the loss of some advantage that he would have gained by compliance. But if notwithstanding that he can take the benefit of section 375 so far from being in a worse he is in a much better position than if he had been bound by the provisions either of the Indian Arbitration Act or of Chapter 37. In both the latter cases a party, who, after making a proper submission, is dissatisfied with the award, has a right of challenging it before it can be converted into a decree or any further action taken upon it. Whereas under the principle of *Pragdas v Girdhardas*<sup>(1)</sup> no sooner has a party made an irregular submission, on which an award, no matter how full of defects, has been passed, than the other party can bring it in under section 375 and, without having any objections investigated, get a final decree upon it. This appears to me, speaking with all proper respect, one fatal objection to the principle upon which the plaintiff here relies. Another objection which I myself feel very strongly, though I cannot deny that this does seem to have been present to the mind of other more learned and eminent Judges who have nevertheless no difficulty in overcoming it, is that a mere agreement to refer a matter to arbitration, cannot logically and without unduly straining language be fairly called an adjustment of a suit. Nor do I think that that difficulty is removed by the fact that an award is made. No doubt if the parties accept the award, then the agreement to refer plus the award which they had accepted, would constitute an adjustment of the suit by a lawful agreement. But mere submission to arbitration cannot, I think, be carried further than a step towards the adjustment of a suit. This difficulty is dealt with in *Pragdas v Girdhardas*<sup>(1)</sup>. The learned Chief Justice, relying upon *Livesley v Gilmore*<sup>(2)</sup>, says "But every submission to arbitration implies an obligation to perform the award of the arbitrator, so that here there was an agreement to perform the award in adjustment of the suit, and that is an adjustment of the suit by agreement." One obvious

(1) (1901) 20 Bom 76 at p 73

(2) (1866) L. R. 1 C P 570.

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objection to that reasoning is that it does away at once with the necessity for all the special procedure prescribed in the Indian Arbitration Act and Chapter 37 of the Civil Procedure Code. For if that principle be uniformly sound and accepted, parties submitting to arbitration would be under an implied promise to accept the award whatever be its nature and however it has been arrived at. That is in fact what they are obliged to do by applying the principle in the same manner in which it has been applied in those cases so as to enable a party wishing to enforce the award to do so directly under section 375. It would be easy to pursue this analysis further by way of explaining and justifying the doubts I feel about the correctness of the decision in *Pragdas v. Girhardas*<sup>(1)</sup>. But, as I have said unless I can distinguish that from the present case I should undoubtedly feel myself bound to follow it. There is, however, one passage in the learned Chief Justice's judgment, which does, I think, warrant me in saying that this is a different case. He says "it is conceded, and I must assume correctly, that under the special circumstances of the case the submission is valid." I will not pause as I might do, to amplify the implication contained in these words beyond saying that notwithstanding what has preceded, the learned Chief Justice evidently thought that a submission to arbitration, before it can be treated as an adjustment of the suit, must be 'valid,' that is to say, made in conformity with the law governing arbitration proceedings. I need not further dwell upon the difficulty which an accurate analysis of what is herein implied might introduce in logically and consistently interpreting the whole judgment. It is enough for my present purpose to point out that had the learned Chief Justice felt any doubt as to the validity of the submission, it is at least fairly arguable whether he would have come to the conclusion he did. In that case, as indeed in all the other cases to which it refers, there was a written submission. It is true that at that time, the Indian Arbitration Act was not in force, and that presumably as this submission was held not to fall within the scope of Chapter 37, there was no statutory need for a written

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submission. Now, however, section 4 of the Indian Arbitration Act requires that wherever that Act is in force, submission to arbitration must be in writing. In the present case there has been no such written reference or submission. I am not denying that this is a technical rather than a substantial distinction because, from Mr Modi's record, it is quite clear [that what he wrote down in the present case fairly and fully expressed all the wishes and intentions of the parties, and had they signed his notes there would have been, to all intents and purposes, a written submission of the kind required by law. As the facts stand, there has been no legal and valid reference to arbitration at all. Mr Modi's award therefore, (for it really is an award and nothing else) has no legal foundation, and can, therefore, have no legal consequences. That, I think, is sufficient, in the view I take of section 375 and of the decisions upon it, to relieve me from the necessity of following against my own judgment the majority of those decisions. As, then, there has been no reference to arbitration and no award, what adjustment of the suit can there be to which I am asked to give effect under section 375? It appears to me that there can be absolutely none. I come to this conclusion with great reluctance because it is clear that all the merits are on the plaintiff's side. There can be no question that all the parties did authorise Mr Modi to settle their disputes and did agree to accept his decision as finally binding upon them. When, however, that decision came to be known, the defendant repudiated it. He has thus gone back upon his own distinct undertaking and I cannot pretend that I feel the least sympathy with him because he has succeeded upon a highly technical point. Indeed I feel so strongly in this matter that although he is here nominally successful, I shall order him to pay all costs which may have been incurred from the date on which all parties, including himself, agreed before Mr Modi, that he should finally decide their disputes, up to the date of the final order upon this motion.

Upon these terms I direct that the motion be dismissed and that the matter be referred back to Mr Modi to take it up as and from the date upon which the parties agreed to make him their sole arbitrator.

Special Commissioner to pay the costs of the other parties out of the share of defendant G.

Attorneys for the plaintiff *Messrs. Jehangir and Seervai.*

Attorney for defendants 1 and 6. *Mr. N. B. Valil.*

Attorneys for defendant 2: *Messrs. Mehta and Shomji.*

Attorneys for defendant 4: *Messrs. Jehangir and Seervai.*

B. N. L.,

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## APPELLATE CRIMINAL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton*

EMPEROR v. TRIBHOVANDAS PURSHOTTAMDAS MANGROLE-  
WALLA \*

1908.

August 17.

*Criminal Procedure Code (Act V of 1898), sections 227, 233, 234, 235, 236 and 237—Charges—Joinder of charges—Misjoinder of charges—Indian Penal Code (Act XLV of 1860), sections 124A, 153A—Sedition—Promoting enmity, etc., between classes—Publication, what constitutes*

The accused was charged at one trial with having committed offences punishable under sections 124A and 153A of the Indian Penal Code, on two charges, one with respect to each of the two articles he published on different dates in his newspaper called the *Hind Swarajya*. At the trial there was no other evidence of the publication of the newspaper in Bombay except the declaration made by the accused under the Press Act, and the depositions of witnesses who received the newspaper in Bombay as Government servants in their capacity as such. The accused was convicted on both the charges and sentenced separately on each of them. It was contended in appeal that there was no evidence of the publication of the newspaper in Bombay, and that there was a misjoinder of charges vitiating the trial.

*Held*, that the evidence on record was sufficient to prove the publication of the newspaper in Bombay.

*Held*, further, that the trial was not bad as there had been no misjoinder of charges.

*Per CHANDAVARKAR, J.*—It is true that the Magistrate framed two charges one with respect to each of the two articles. But in each charge the offences are mentioned as being the same punishable under sections 124A and 153A of the

\* Criminal Appeal No. 237 of 1908.

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Indian Penal Code so that the accused had distinct notice of the charges he had to answer and he could hardly have been prejudiced by the somewhat informal mode in which the charges were drawn up. The defect if any was no more than a mere irregularity, cured by the provisions of section 223 of the Code of Criminal Procedure.

There is nothing in the Criminal Procedure Code which directs that where an accused person is alleged to have done two or more acts each of which may fall within the definition of an offence under one or another section of the Indian Penal Code, the section or sections in either case being the same the joinder of the charges under those sections is illegal. Substantially the acts amount in such a case to offences punishable under the same sections of the Indian Penal Code and therefore they are offences of the same kind.

*Per HEATON J*—Section 234 of the Criminal Procedure Code does not say that at most a trial must be limited to three charges: it says it must be limited to three offences and that the offences must be of the same kind. The offence as defined by the Code itself is the act or omission made punishable. The offences in this case were two in number namely the publication of two articles on two different dates. These two offences were as charged punishable under the same section of the Indian Penal Code, and were therefore offences of the same kind. The word 'section' in section 234 of the Criminal Procedure Code is not invariably to be read as singular. It is not the intention of the Code of Criminal Procedure, either express or implied, to exclude from the operation of section 234 of the Code, an offence because it is made the subject of more than one charge.

Charging one act or series of acts under more than one section of the Indian Penal Code is a proceeding provided for in section 235 (clause 2) and in section 236 of the Criminal Procedure Code and is also provided for in section 71 of the Indian Penal Code. The Court may charge an offence twice over under two different sections but by so doing it cannot increase the sentence which may be imposed. That principle is not offended by trying together separate offences for each of which there is more than one charge.

*APPEAL from convictions and sentences passed by A. H. S. Asten Chief Presidency Magistrate of Bombay*

The accused was the editor, publisher and proprietor of a newspaper called the *Hind Swarajya* published in the Gujarati language. He was charged with two offences punishable under sections 124A and 153A of the Indian Penal Code, with respect to an article entitled 'Englishmen afraid of the pen' which appeared in an issue of his newspaper dated the 4th April 1908, and also with reference to another article entitled "A grave warning" which appeared on the 11th idem in his newspaper.

He was tried by the Chief Presidency Magistrate of Bombay where he was charged as follows —

"I, A. H. S. Aston, Esquire, Chief Presidency Magistrate Bombay, hereby charge you Tribhovandas Purshottamdas Mangrolwalla, as follows —

"That you on or about the 4th day of April 1903 at Bombay by words intended to be read, namely, an article in the Gujarati which is headed when translated 'Englishmen afraid of the pen' published in the *Hind Swarajya* newspaper of which you were the editor, printer and proprietor brought or attempted to bring into hatred or contempt or excited or attempted to excite feelings of disaffection towards the Government established by law in British India and promoted or attempted to promote feelings of enmity or hatred between different classes of His Majesty's subjects, namely, between Native Indian and European subjects and thereby committed an offence punishable under sections 124A and 153A Indian Penal Code

"2ndly — That you on or about the 11th day of April 1903 at Bombay by words intended to be read, namely, an article printed in the English and Gujarati languages which is headed when corrected and translated 'A grave warning' published in the *Hind Swarajya* newspaper of which you were the editor, printer and proprietor brought or attempted to bring into hatred or contempt or excited or attempted to excite feelings of disaffection towards the Government established by law in British India and promoted or attempted to promote feelings of enmity or hatred between different classes of His Majesty's subjects, namely, between Native Indian and European subjects and thereby committed an offence punishable under sections 124A and 153A of the Indian Penal Code and within my cognizance

"And I hereby direct that you be tried on the said charges

At the trial, the prosecution tendered into evidence the declaration made by the accused under the Press Act before the Chief Presidency Magistrate of Bombay, as the printer and publisher of the "*Hind Swarajya*" And there were two witnesses on behalf of the prosecution, the Oriental Translator to the Government of Bombay and a clerk in his office, who deposed to having received the copies of the newspaper in Bombay in their capacity as Government servants

The Magistrate convicted the accused on both the charges, and sentenced the accused to two years' rigorous imprisonment on the first charge and to one year's rigorous imprisonment on the second charge: the sentences to run consecutively.

The accused appealed to the High Court.

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*Baptista* for the accused.—There is no evidence of publication of the newspaper in Bombay. The declaration by the accused under the Press Act is no evidence of publication; nor would publication be proved by depositions of two witnesses who received copies of the newspaper in Bombay merely as and in their capacity of Government servants.

Secondly, the trial is bad on the score of misjoinder of charges. The accused is charged with both under section 124A and section 153A of the Indian Penal Code in respect of each of the two articles that appeared in his newspaper on the 4th and 11th April 1908, respectively. The offence under section 124A is distinct from the one under section 153A and a separate charge for each of them should have been framed. The Criminal Procedure Code positively enacts that two charges are necessary, this is an illegality and not an irregularity which could be cured under section 537 of the Code. See *Emperor v. Fattu*<sup>(1)</sup>, *Subrahmanya Ayyar v. King-Emperor*<sup>(2)</sup>, *Sukh Lal Sheikh v. Tara Chand Ta*<sup>(3)</sup>, *Thomas v. Emperor*<sup>(4)</sup>, and *Queen-Empress v. Anant Purani*<sup>(5)</sup>.

The forms of charges in the schedule to the Criminal Procedure Code distinctly indicate that there ought to be separate counts for separate offences, and even a separate head of charge for each offence under the same section in the same transaction. See the form regarding the substantive offence and the attempt under section 211 of the Indian Penal Code. Furthermore, the form prescribes three heads of charge for section 382 of the Indian Penal Code. This is a clear indication that legislature requires that the charges should be very specific, definite and distinct for each offence.

Assuming that the Magistrate has complied with the provision of section 233 so far as charges are concerned, then the particulars as required by section 225 are not given. He ought to have pointed out the passages in the first article that came within the purview of section 124A and those that came under section 153A.

(1) (1907) 23 All 195

(3) (1905) 33 Cal. 68 at p. 72

(2) (1911) 25 Mad. 61

(4) (1906) 29 Mad. 65a.

(5) (1909) 25 Bom. 90.

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&  
TERRILL  
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Section 233 of the Criminal Procedure Code says that each charge shall be tried separately. In this case there are four offences and two charges. Section 234 is an exception to section 233. But offences under sections 124A and 153A of the Indian Penal Code are not offences of the same kind, and the articles of the 4th and 11th April are not parts of the same transaction within the meaning of section 235 of the Criminal Procedure Code.

*Brayson* (acting Advocate General) for the Crown.—Sections 234, 235, 236 and 239 of the Criminal Procedure Code are exceptions to section 233 of the Code. Section 235 is put after section 234 to meet with those cases where facts alleged show that they come under two or more different sections of the Indian Penal Code. There is therefore no irregularity in joining section 153A read with section 124A in the charge.

*CHANDAVARKAR, J.*—This is an appeal from the judgment of the Chief Presidency Magistrate of Bombay, convicting the appellant of two offences one under section 124A and the other under section 153A of the Indian Penal Code arising out of each of two articles published in a Gujarati newspaper called the *Hind Swarajya*. Several points of law have been urged by the appellant's Counsel, Mr. Baptista. The first of them is that the learned Chief Presidency Magistrate had no jurisdiction to try the case. This objection to jurisdiction is based upon the ground that there is upon the record no evidence of the publication of the newspaper in Bombay. But three witnesses examined for the Crown state that they received the newspaper in Bombay, and there is the declaration made by the appellant himself under the Press Act. The mere fact that two of the witnesses are servants of Government who received the newspaper as its agents, cannot in law render their evidence inadmissible on the question of publication.

The second and the third point urged by Mr. Baptista have hardly any substance. It is contended that the trial is rendered illegal because the learned Magistrate did not frame a separate charge for every distinct offence as required by the first part of section 233 of the Code of Criminal Procedure. It is true that



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the Magistrate framed two charges—one in respect of the article of the 4th of April and the other in respect of the article of the 11th of April, 1908. But in each charge the offences are mentioned as being those punishable under sections 124A and 153A, so that the appellant had distinct notice of the charges he had to answer, and he could hardly have been prejudiced by the somewhat informal mode in which the charges were drawn up. The defect, if any, was no more than a mere irregularity, cured by the provisions of section 225 of the Code of Criminal Procedure. It is further contended that the trial is illegal because the particulars in respect of each of the charges were not given by the Magistrate by the specification in the charge-sheet of the passages in each of the articles, which, according to the case for the Crown, brought those articles within sections 124A and 153A of the Penal Code. But the case for the Crown was in the Court below, as it is here that each of the two articles taken as a whole brought the act of the appellant within each of these sections. Under those circumstances no specification of any particular passages was called for.

I pass on now to Mr. Baptista's argument that the trial is illegal on the ground of misjoinder of charges. The misjoinder complained of is that the offence charged under section 124A of the Indian Penal Code arising out of the article of the 4th of April, being distinct from, and not an offence of the same kind as, the offence charged under section 153A of the same Code, arising out of the article of the 11th of April, and that the offence charged under section 153A as arising out of the former article being distinct from and not an offence of the same kind as the offence charged under section 124A as arising out of the latter article, the learned Magistrate ought not to have tried these charges together at one trial. It is admitted by Mr. Baptista that the charge for the offence under section 124A of the Penal Code in respect of one of the two articles in question could be legally joined to the charge for the offence under the same section in respect of the other article. And in such a case it is equally clear from sections 236 and 237 of the Code of Criminal Procedure that if in respect of each of the articles the evidence recorded substantiated the offence under section 153A, instead of the offence

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under section 121A, the accused could be legally convicted of the former offence, even though it did not form the subject-matter of the charge. That being the case, the addition of the offences under that section in the charge sheet cannot be held to be illegal. On the other hand, it was an advantage to the appellant in that he had notice of the additional offence charged, of which he could have been under the Code convicted without any notice in the charge sheet. It is true that, as urged by Mr. Baptista, the offence under section 121A of the Penal Code is not an offence of the same kind as an offence under section 153A of the Code. And the Criminal Procedure Code no doubt provides that those two offences cannot be tried together. But there is nothing in the Code which directs that where an accused person is alleged to have done two or more acts, each of which may fall within the definition of an offence under one or another section of the Penal Code, the section or sections in either case being the same, the joinder of the charges under those sections is illegal. Substantially the acts amount in such a case to offences punishable under the same sections of the Indian Penal Code and therefore they are offences of the same kind.

Mr. Baptista has not denied the seditious character of the article of the 4th of April. On the other hand, he has candidly admitted before us that he cannot defend the article in question so far as the offence under section 121A of the Penal Code is concerned. The other article, that of the 11th of April, he contends, is a mere republication of what came into the appellant's hands from outside, and was published by the appellant with remarks showing that he did not approve of the sentiments in the article. It is clear, however, from the evidence of surrounding circumstances that the so called disapproval was feigned and ironical and that the appellant published the article in question because it gave him an opportunity of bringing the established Government of the land into hatred and contempt.

Under these circumstances it is unnecessary to consider whether either of the articles can rightly come under section 153A of the Penal Code.

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We affirm the conviction under section 124A, and as to the sentences we decline to interfere on the ground that they cannot be considered too severe.

HEATON, J. —Mr Baptista's first argument was that publication in Bombay was not proved. There is no substance in that.

His main arguments were directed to the charge and were to the effect that as the charge was contrary to law the trial was illegal a general proposition which he sought to make good by the authority of the Privy Council judgment in *Subrahmanya Ayyar's* case (1).

In order to understand the argument it is necessary to set out the charge. It reads as follows —

"I, A. H. S. Aston, Esquire, Chief Presidency Magistrate, Bombay, hereby charge you Tribhovindas Purshottamdas Mangrolawalla as follows —That you on or about the 4th day of April 1903 at Bombay by words intended to be read namely, an article in the Gujarati which is headed when translated 'English men afraid of the pen' published in the *Hind Swarajya* newspaper of which you were the editor, printer and proprietor brought or attempted to bring into hatred or contempt or excited or attempted to excite feelings of disaffection towards the Government established by law in British India and promoted or attempted to promote feelings of enmity or hatred between different classes of His Majesty's subjects namely, between Native Indian or European subjects and thereby committed an offence punishable under sections 124A and 124B, Indian Penal Code.

'Zadly —That you on or about the 11th day of April 1903 at Bombay by words intended to be read, namely an article printed in the English and Gujarati languages which is headed when corrected and translated 'A grave warning' published in the *Hind Swarajya* newspaper of which you were the editor, printer and proprietor brought or attempted to bring into hatred or contempt or excited or attempted to excite feelings of disaffection towards the Government established by law in British India and promoted or attempted to promote feelings of enmity or hatred between different classes of His Majesty's subjects namely, between Native Indian and European subjects and thereby committed an offence punishable under sections 124A and 124B of the Indian Penal Code and within my cognizance.

"And I hereby direct that you be tried on the said charges.

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TIRUVAN  
DAS

First, it is said that this charge is unlawful because it does not follow the form given in Schedule V to the Criminal Procedure Code for charges with two or more heads, but instead of doing so combines in one whole in each case the charges under sections 124A and 153A. The defect is a very formal one and is cured by section 215 of the Code which says — 'No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.' The Privy Council case referred to is not an authority for saying that such an error in the charge is an illegality vitiating the trial. It is only necessary to read the judgment in that case to see that then Lordships of the Privy Council were dealing with a grossly illegal trial, and there is apparent throughout that judgment as strict an adherence as possible to the facts of that particular case, and as little generalization as is compatible with a true presentment of their reasons.

Mr Baptista's next objection was that though it was not illegal to charge the appellant on the articles as a whole, yet when charged in respect of each article under sections 124A and 153A, he was prejudiced as he did not have notice of the particular passages in each article on which the prosecution relied to bring it first under section 124A and secondly under section 153A. To this the answer is that as regards these charges the prosecution did not proceed on separate passages but on the articles as a whole. But Mr Baptista argues in effect that his client ought to have had notice, before he was required to enter on his defence, of the process of reasoning by which the prosecution brought each article under section 124A and also under section 153A of the Penal Code. Whatever application such an argument may have to cases in general, it fails in its application to this case, because the process of reasoning which the prosecution followed, was to deal with the articles as a whole and not with particular passages and the accused had notice that he was charged under section 124A and under section 153A in respect of each article as a whole.

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 GIBSON  
 DAS

The last of Mr. Baptista's technical arguments was that the joinder of the charges relating to the two publications of the 4th and 11th April, was illegal and vitiated the trial. He assumes for the purpose of this argument that there were four charges, two relating to each article, and he urges that as each of the four charges did not relate to an offence of the same kind, they could not be tried together. He bases his argument mainly on sections 233 and 234 of the Code of Criminal Procedure which run as follows —

' 233 For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239

" 234 (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, he may be charged with, and tried at one trial for, any number of them not exceeding three

" (2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local law

Section 234 does not say that at most a trial must be limited to three charges. It says it must be limited to three offences and that the offences must be of the same kind. The "offence" as defined by the Code itself, is the act or omission made punishable. The offences in this case were two in number, namely, the publication of the 4th April and the publication of the 11th April. These two offences were, as charged, punishable under the same sections of the Indian Penal Code and were, therefore, it seems to me, offences of the same kind. If the word "section" in the second clause of section 234 be read as incapable of meaning "sections," that is, if it be read as invariably singular, then Mr. Baptista's argument is good, not otherwise. But I do not think it is the intention of the Code, either expressed or implied to exclude from the operation of section 234 an offence because it is made the subject of more than one charge.

Charging one act or series of acts under more than one section of the Indian Penal Code is a proceeding provided for in section 235 (cl. 2) and in section 236 of the Criminal Procedure Code and is also provided for in section 71 of the Indian Penal Code which

says: "where anything is an offence falling within two or more separate definitions . . . the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences" You may charge an offence twice over under two different sections but by so doing you cannot increase the sentence which may be imposed. That principle is not offended by trying together separate offences for each of which there is more than one charge. Therefore I do not think the joinder of charges in this case was contrary either to the express words or the principle of the law.

On the merits there is little to be said. A careful perusal of the article of the 4th April shows a deliberate design to excite feelings of disaffection towards the Government established by law in British India, or to bring that Government into hatred and contempt. The nature and tone of the article or letter of the 11th, the general character of *Hind Swarajya* as evidenced by its own publications, the circumstance that the letter said to be received from outside was translated into Gujarati, and the introductory words printed before the translation taken together, convince me that the publication of the 11th also was deliberately designed to do the same. It is not very material to consider whether the offences also fell under section 153A of the Indian Penal Code. The convictions are, in my opinion, good under section 124A, and the sentences, I consider, are not too severe. So I concur in the order confirming the conviction and sentences.

*Conviction and sentence confirmed.*

R. P.

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APPELLATE CIVIL.

Before Mr. Justice Chandrasekhara and Mr. Justice Heaton

1903.

September 2

RAMAKRISHNA alias RAMASWAMI BIN KUPPUSWAMI (ORIGINAL PLAINTIFF) APPELLANT, v TRIPURABAI KUM KUPPUSWAMI MOD LIAR (ORIGINAL DEFENDANT) RESPONDENT\*

*Hindu law—Adoption—Adoption by a widow—Alienation by the widow prior to the date of adoption—Right of the adopted son to dispute the alienation*

Where a Hindu widow, who has inherited her husband's property, adopts a son, the adoption has the effect of divesting her of the property and putting an end to her estate as heir of her husband. The adoption has the same effect as her death with this difference that after the adoption she has a right of maintenance against the adopted son during the rest of her life. But the right of maintenance so long as it is not a charge on the estate or any portion of it, does not confer on her any right to the estate or entitle her to transfer it by way of sale or mortgage.

Thus, if a widow, before the adoption severs a portion of the inheritance therefrom and transfers it to a stranger, without any proper or necessary purpose binding the estate absolutely according to Hindu law, the transfer logically speaking, must cease to have any effect after the adoption since it could only operate during the time that the estate was represented by her as heir and the result of the adoption is to terminate that estate.

*Lakshman v Radhabai*<sup>(1)</sup> and *Moro v Balaji*<sup>(2)</sup>, followed. *Sietamulu v Kristamma*<sup>(3)</sup>, not followed.

SECOND appeal from the decision of T. D. Fry, District Judge of Dhárwār, confirming the decree passed by V. V. Phadke, First Class Subordinate Judge at Dhárwār.

Suit for a declaration that the plaintiff was the owner of certain property.

The property in dispute belonged to one Kuppuswami, who died leaving him surviving his widow Tripurabai (defendant No. 1). She went into possession of the property, and mortgaged the same with the defendant No. 2 for Rs. 400. The mortgagee (defendant No. 2) obtained a decree on his mortgage. The property was sold in execution of the decree and purchased by defendant No. 3.

\* Second appeal No. 579 of 1907.

(1) (1887) 11 Bom 607.

(2) (1884) 19 Bom 500.

(3) (1902) 26 M.L.J. 117.

After this, Tripurabai adopted the plaintiff on the 28th January 1905

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On the 10th March 1905, the plaintiff as the adopted son of Kuppu wami brought a suit, to obtain a declaration that he was the owner of the property.

The Subordinate Judge held that the transaction entered into by Tripurabai was for good consideration and valid, and was binding on the plaintiff. His reasons were as follows —

"Almost at the close of the trial the defendants produced a certified copy of a decision of the Bombay High Court (*Bhandarkar v. Ishwardas*) wherein it has been held that an adopted son of a Hindu widow has no right during her life time to question the validity of alienations effected by the widow before his adoption. It is clear that this decision will bar the present suit. This Court is bound to follow a decision of the High Court but I have got my own misgivings owing to the fact that the decision has not been reported even in the Bombay Law Reporter. These cases are likely to go before the High Court where the decision now relied on by the defendants may be reconsidered.

On appeal, this decree was confirmed by the District Judge on the following grounds —

"I have before me the decision of the Bombay High Court in the unreported case referred to by the Subordinate Judge. It does not however, seem necessary for me to discuss the propriety of following an unreported judgment as I propose to follow the Madras judgment in *Sreeramulu v. Krishnamma* (26 Mad 143), which appears to conclude the question at issue.

It is urged on the other side that this ruling is opposed to the Bombay rulings in *Laxman v. Radhabai* (11 Bom 609) and *Mos v. Balaji* (19 Bom. 809).

If this were so I should of course, follow the Bombay rulings, but it seems clear that the Madras case raises and decides the point for the first time.

On page 143 of the Madras judgment occurs the following passage:—

In the few reported cases in which a son adopted by a widow brought a suit during her life time to set aside alienations made by her prior to the adoption, the decision proceeded on the assumption that he would be entitled to recover possession of the property alienated, unless the alienation was made for a purpose which would be binding upon a reversionary heir. In all the cases in which the alienation was set aside at the instance of the adopted son the decision proceeded only on the ground that the widow exceeded her lawful power in making the alienation. In none of them was the question distinctly



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raised and considered, whether the vendee would not in any event be entitled to retain possession during her life time as the widow of her deceased husband

The point is then considered at length and the suit brought by the adopted son is dismissed as premature

I thus have excellent authority for holding that this decision is not opposed to any former decision

That being the case it is clearly my duty to follow this judgment unless and until it is dissented from by the Bombay High Court. More especially is that course incumbent on me when I find it remarked on page 155 that the rule is not only sound in principle but is in consonance with justice and equity

The plaintiff appealed to the High Court

*A. G. Desai* for the appellant —The decision in *Sreeramulu v. Kristarima*<sup>(1)</sup> is no doubt against me, but it is opposed to the rulings of this Court in *Lalshmar v. Radhabai*<sup>(2)</sup>, *Moro v. Bolaji*<sup>(3)</sup>, which should be followed here

*G. S. Mulgaonkar* for the respondent —The question raised in this appeal was argued in *Bhandixit v. Ishwardixit*<sup>(4)</sup>, where the Madras case is followed. It has however, not been followed in *Raoji Nana v. Kesu Nana*<sup>(5)</sup>

CHANDAVARKAR, J. —The District Judge has rejected the appellant's claim, holding on the authority of *Sreeramulu v. Kristarima*<sup>(1)</sup>, that where a Hindu widow, who has inherited her husband's immovable property, alienates part of it and then adopts a son, the son cannot sue to recover possession of the property until the termination of her widowhood, even though the alienation was not for a proper or necessary purpose justified by Hindu law. This Madras ruling is directly opposed to the decisions of this Court in *Lakshman v. Radhabai*<sup>(2)</sup> and *Moro v. Bolaji*<sup>(3)</sup>, which the District Judge has misread in thinking that they are not conclusive on the point. There is an earlier decision of this Court (*Nathaji Krishnaji v. Hari Jagaji*)<sup>(6)</sup>, which is equally conclusive. (See page 73 of that report.) Besides, these decisions have been followed in this Court except in one case (*Bhandixit bin Bhashardixit v. Ishwardixit bin Bhashardixit*<sup>(4)</sup>) in which Russell and Batty, JJ., followed the

(1) (1902) 26 M.L.J. 143

(2) (1857) 11 Bom. 609.

(3) (1874) 17 Bom. 807

(4) E.A. No 146 of 1905 (Unrep.)

(5) S.A. No 652 of 1907 (Unrep.)

(6) (1871) 8 Bom. H.C.R. 14 & 87.

Madras decision. It does not appear to have been brought to the notice of those learned Judges that the law enunciated in *Nathaji Krishnaji v. Hari Jagaji*<sup>(1)</sup> and, the other two decisions (*Lalshuman v. Rathabai*<sup>(2)</sup> and *Moro v. Balaji*<sup>(3)</sup>), has been followed in this Court in a number of unreported decisions and has been understood to be well established in this Presidency since the year 1871.

Where a Hindu widow, who has inherited her husband's property, adopts a son, the adoption has the effect of divesting her of the property and putting an end to her estate as heir of her husband. The adoption has the same effect as her death, with this difference that, after the adoption, she has a right of maintenance against the adopted son during the rest of her life, but that right, so long as it is not a charge on the estate or any portion of it, does not confer on her any right to the estate or entitle her to transfer it by way of sale or mortgage. These are indisputable propositions of law and indeed they are admitted in the Madras judgment on the authority of the Privy Council ruling in *Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah* <sup>(4)</sup>

If the widow, before the adoption severs a portion of the inheritance therefrom and transfers it to a stranger, without any proper or necessary purpose binding the estate absolutely according to Hindu law, the transfer logically speaking, must cease to have any effect after the adoption, since it could only operate during the time that the estate was represented by her as heir and the result of the adoption is to terminate that estate.

But in support of their view the learned Judges who delivered the judgment in *Sreeramulu v. Aristamma*<sup>(5)</sup>, rely on those decisions of the Privy Council and of our High Courts, in which it has been held that a Hindu widow has "an absolute right to the fullest beneficial interest in her husband's property for her life," that is, 'during the term of her widowhood' Now, as a general proposition of Hindu law, that is true. But the cases in which it has been so held and which are cited in the

(1) (1871) 8 Bom. H. C. P. A. & J. 67

(2) (1887) 11 Bom. 607

(3) (1894) 19 Bom. 609

(4) (1843) 3 Moo. I. A. 229 at p. 242.

(5) (1907) 30 Ma. L. 143

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Madras judgment, were cases in none of which was any question of an adoption by the widow and the effect it has on her estate as heir of her husband, involved. It is straining the language of those decisions, particularly the words "during her widowhood," to apply them to a state of facts not contemplated or covered by those decisions. That general proposition is qualified by the proposition laid down in other cases that such an adoption puts an end to that estate and divests her of it, though her widowhood continues.

The Madras judgment proceeds upon the analogy of an adoption made by a Hindu father after he has alienated any portion of his ancestral property. Now, it is true that the adopted son in such a case cannot question the alienation and that he becomes joint owner with the father only as to such ancestral property as the father was possessed of at the date of the adoption. But there can be no analogy between such a case and a widow making an adoption to her husband. In the case of the father, at the date of the alienation he was full proprietor of the property—he could do what he liked with it so long as there was then no son to restrict his right of alienation to purposes defined by Hindu law. The alienor takes the property absolutely and the subsequent adoption cannot affect it. *Rambhat v. Lakshman Chintaman*<sup>(1)</sup>. It is otherwise with a widow. Though she represents the estate as heir at the date of an alienation by her, her right is of a limited character and she has no absolute right over it except in certain cases defined by law. She can confer an absolute right on her alienor only in those cases, otherwise the alienation has effect only during the time that her widow's estate lasts. That estate, according to Hindu law, comes to an end either when she dies or when she makes an adoption. The alienor takes the property from her subject to that law, provided the alienation was not for a proper or necessary purpose according to Hindu law. It is difficult to see how the case of a father can supply any analogy to the case of a widow, which rests on different principles.

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But the learned Judges in the Madras judgment rely on certain observations of the Privy Council in the well-known case of *Moniram Kolita v. Kerry Kolitany*<sup>(1)</sup> as having "an important bearing on the question now under consideration and as lending support to their view. The observations are —

'But, further the widow has a right to sell or mortgage her own interest in the estate. If her estate ceases by an act of unchastity the purchaser or mortgagee might be deprived of the estate, if the surviving brother of the husband should prove that the widow's estate had ceased in consequence of an act of unchastity committed by her prior to the sale or mortgage.'

Laying emphasis on the word 'prior' the learned Judges in their judgment remark —

"It will be noted that in this passage the Privy Council distinctly assume that even if the widow's estate should cease by her committing an act of unchastity and the succession of her husband's heirs should thereby be accelerated, the purchaser or mortgagee, from her, of her own life-interest in the estate would not be divested of it, if the sale or mortgage had taken place prior to her act of unchastity, but only if it had been *subsequent thereto*"<sup>(2)</sup>

The observations of the Privy Council must be read by the light of the context in which they occur. The question in *Moniram Kolita's* case<sup>(1)</sup> was whether unchastity in a widow causes forfeiture of the property which she has inherited from her husband where such unchastity is subsequent to the inheritance. After dealing with the texts in the Hindu law books on the subject and concluding on the strength of those texts that such unchastity does not cause forfeiture their Lordships proceed to refer to Mr. Justice Jackson's judgment as pointing out "the mischief, uncertainty and confusion that might follow upon the affirmation of the doctrine that a widow's estate is forfeit for unchastity, particularly, in the present constitution of Hindu society and the relaxation of so many of the precepts relating

(1) (1880) L. R. 7 I A 115 at p. 115.

(2) (1907) 27 M.L.J. 142 at p. 143.

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to Hindu widows" It is in this latter connection that the observations in question occur in the judgment of the Privy Council First, their Lordships point out that if unchastity in a widow were held to involve the consequence of forfeiture of her estate, the reversionary heir of her husband, if he happened to be her husband's brother, might lead her into temptation and thus accelerate the succession in his own favour That is one mischief Next it is pointed out that a person who had taken a purchase or mortgage from her after her unchastity might suffer The hardship, uncertainty and confusion, in such a case is obvious. The purchaser or mortgagee might not know of the unchastity at the time of the alienation in his favour, and to be deprived of the estate because the unchastity is subsequently *proved*, is hard upon the alienee, because, in that event, he must be treated as a trespasser *ab initio*, having taken the transfer without any title These considerations do not exist in the case of a purchase or mortgage before the act of unchastity There the purchaser or mortgagee takes a good title, subject to the condition that it will last until the widow's estate as heir is terminated in any of the modes recognised by Hindu law. Upon the hypothesis that unchastity is one of those modes, the purchaser or mortgagee, who takes the property subject to that condition, cannot complain of hardship, if subsequently the widow turns out to be unchaste, because till then he has the right to the estate. It is in this light that the Privy Council would seem to have made the observations above cited.

There is nothing in the judgment of the Privy Council to warrant the inference that their Lordships intended the observations in question as more than mere "*argumentum ab incon- venienti*," or to convey more than they have said expressly by way of illustration The inference drawn from them by the Madras High Court is directly opposed to the decision of the Privy Council in *Bamundoss Mookerjee v. Mussamut Tarinet*<sup>(1)</sup> in which they entirely adopted the following *dictum* of the Bengal Sadar Dwyani Adalat "In that case, the son, when adopted, became the undoubted heir, and it was of course the

(1) (1853) 7 Moo. I A. 169 at p. 160.

correct doctrine that no sale made by a widow, who possesses only a very restricted life interest in the estate, could have been good against any ultimate heir, whether an adopted son or otherwise, unless made under circumstances of strict necessity."

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Article 125 of the second schedule to the Limitation Act, 1877, is also invoked by the learned Judges in the Madras judgment in support of their view. That Act, being a law of procedure should not be presumed to have effected any change in the rights of parties given by the substantive Hindu law. Article 125 applies only to a reversionary heir which indeed a son adopted by a widow is not. But Articles 118 and 119 specially provide for the case of such a son, and where those Articles do not apply, the case must fall within Article 144 see *Moro v Balaji*.<sup>(1)</sup>

It is to be remarked that the judgment of the Madras High Court in *Sreeramulu v Krutamma*<sup>(2)</sup> throughout confines the principle of its decision to a case where the alienation by a Hindu widow made before the adoption of a son by her, is of only a portion of the property inherited by her from her husband. If the principle is sound, there is no intelligible reason why it should not equally apply to a case where the widow has alienated the whole and not merely a portion of the property. The distinction made throughout the judgment in that respect is purely arbitrary. No authority is cited for it and it rests on no principle derived from texts or decided cases. After this, it is not necessary to follow the judgment in the consideration of the question whether its ruling is 'in consonance with justice and equity'. Notions of justice and equity vary and the considerations on that head noticed at the conclusion of the judgment may well be counterbalanced by others equally, if not more weighty. Most of those considerations are inapplicable to the law of adoption in this Presidency, where a widow is entitled to adopt a son, unless her husband has prohibited it, whereas in the Presidency of Madras she has to obtain the consent of her husband's *sapindas* to such adoption. In any case, such considerations as are pointed out in the judgment cannot outweigh the established principles of Hindu law.

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For these reasons we adhere to the decisions of this Court in *Lalshman v. Radhabai*<sup>(1)</sup> and *Moro v. Balaji*<sup>(2)</sup> not only on the ground of *stare decisis*, but also as being sound Hindu law. Reversing the decree of the lower appellate Court we remand the appeal for disposal according to law on the merits. Costs shall abide the result.

*Decree reversed*

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(1) (1887) 11 Bom 609

(2) (1894) 19 Bom 809

## APPELLATE CIVIL.

*Before Chief Justice Scott and Mr Justice Chandavarkar*

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October 6

KAVERIAMMA AND ANOTHER (ORIGINAL PLAINTIFFS) APPELLANTS v  
LINGAPPA BIN RAMA AND OTHERS (ORIGINAL DEFENDANTS) RESPONDENTS \*

*Transfer of Property Act (IV of 1882) section 50—Mortgage with possession—Lease to mortgagor—Death of the mortgagee and his surviving undivided brother—Sister entitled as heir—Possession and management by mortgagee's widow—Payment of the rent by the tenant in good faith to mortgagee's widow—Suit by sister for recovery of rent—Assignment by lessor not necessary*

On the 14th December 1895 Lingappa mortgaged with possession certain property to Subraya who on the same day let out the property to Lingappa for twelve years. Subsequently Subraya having died his interest as mortgagee survived to his undivided brother Ramkrishna. Ramkrishna died in the year 1901 and thereafter possession and management of the property was taken by Subraya's widow Gowri. She got her name placed on the *klata* as owner of the property and recovered rent from the tenant for the years 1902 and 1903. The person entitled to the property was Kaveriamma as the sister and heir of Subraya and Ramkrishna and she brought a suit against the tenant for the recovery of rent of the said years on the ground that Gowri had no authority to receive rent and give discharge for the same.

*Held*, that the defendant was not chargeable with rent sued for. Section 50 of the Transfer of Property Act (IV of 1882) was applicable inasmuch as the defendant in making the payment to Gowri acted in good faith and had no notice of the plaintiff's interest in the property. The language of the section is general and no assignment by the lessor during the tenancy was necessary.

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SECOND appeal against the decision of C C Boyd, District Judge of Kánara, confirming the decree of E F. Rego, Subordinate Judge of Honávar

The plaintiffs alleged as follows —Plaintiff 1's father Parameshwar Bhat died possessed of landed estate the khata of which stood in his name in the revenue records. He died leaving him surviving two sons, Subraya and Ramkrishna, and a daughter, plaintiff 1. Ramkrishna was a minor and he lived in union with Subraya. On Parameshwar Bhat's death the khata of the lands was transferred to Subraya's name. Subsequently Subraya died leaving a widow Gowri. On Subraya's death the khata was transferred to the name of Ramkrishna. Thereafter Ramkrishna also died unmarried and issueless. Plaintiff 1 was thus entitled to the property as heir, she being the sister of Ramkrishna. While Subraya was alive the three defendants and their two brothers executed to him a mortgage-deed of the lands in dispute for Rs 800. The mortgage was with possession and was dated the 14th December 1895 and on the same day defendant 1 took up the lands on a Chalgani lease for twelve years and passed a kabulayat to Subraya. The plaintiffs, therefore, brought the present suit against the tenant defendant 1 and his two brothers defendants 2 and 3, who were all in possession of the mortgaged property to recover arrears of rent for the years 1902 and 1903. Plaintiff 2 was joined as a party because he had purchased from plaintiff 1 a moiety of her interest in the estate.

Defendant 1 answered *inter alia* that the suit was untenable, that he had no privity of contract or privity of estate with the plaintiffs who were not the lawful owners of the lands that the lands belonged to his family and were mortgaged with possession to Subraya from whom the defendant alone took them on a lease and paid rent to Subraya and after his death to his widow Gowri, that he had no sort of *vinculus juris* with the plaintiffs, that Ramkrishna had no interest and he was not Ramkrishna's tenant that defendants 2 and 3 lived separately and they had nothing to do with the leaseholds that he had paid the rent in suit to Gowri and had taken receipts from her, that he was not aware of the purchase by plaintiff 2 from plaintiff 1 that the purchase was invalid and that the suit was collusive and vexatious.



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Defendant 2 was absent

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Defendant 3 stated that the mortgage-debt which they had contracted was the family money of Subraya and Ramkrishna but the bond was passed to Subraya alone, that Subraya and Ramkrishna lived in union, that he was willing to pay the mortgage debt to a rightful heir declared by the Court and that he was not liable to pay the rent in suit as the lease was taken by defendant 1 alone.

The Subordinate Judge found that the Chalgeni lease alleged by the plaintiffs was proved, that their title to recover the arrears of rent was not proved, that the payment alleged by defendant 1 was proved, that the payment was binding upon the plaintiffs, that Subraya and Ramkrishna lived in union but the sum advanced for the mortgage-debt was the self-acquisition of Subraya and that the plaintiff was not entitled to recover the arrears of rent claimed. The suit was, therefore, dismissed.

On appeal by the plaintiff the District Judge raised the following issues :—

(1) Was plaintiff's evidence wrongly excluded ?

(2) Was the mortgage amount the self-acquired property of Subraya or the joint family property of Subraya and Ramkrishna ?

(3) Can plaintiffs recover the rent sought ?

(4) Do the payments of rent by defendants to Gowri bind plaintiffs ?

The findings on the said issues were :—

(1) No

(2) Self-acquired property of Subraya.

(3) No.

(4) No finding necessary.

The District Judge, therefore, confirmed the Subordinate Judge's decree.

The plaintiffs preferred a second appeal

*N. A. Shivesharkar* for the appellants (plaintiffs).

*S. S. Patkar* for the respondents (defendants).

The second appeal was heard by Chandavarkar and Heaton, JJ., who, on the 19th July 1907, delivered the following interlocutory judgments —

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CHANDAVARKAR, J. — There are two points urged before us in support of this second appeal. First it is contended that the evidence of the appellants was wrongly excluded by the Subordinate Judge. The exclusion complained of was under the following circumstance. It appears that the Subordinate Judge and also the parties to the suit were under the impression that the onus lay in the first instance upon the defendants. Accordingly the plaintiff's pleader put in an application on 8th September 1904 praying that the plaintiff's witnesses might be summoned after the defendants' witnesses had been examined. Now, the order passed by the Subordinate Judge which is in Kanarese is clearly to the effect that as prayed by the plaintiffs their application should be brought before him at the conclusion of the defendants' evidence for the purpose of ordering summonses to issue to the plaintiff's witnesses. That meant that the prayer was granted. We think that it was a wrong order to pass. Such an order is calculated to create unnecessary delay in the disposal of cases. However that be, here the plaintiffs were led by the Subordinate Judge's order to believe that their witnesses would be summoned after the defendants' witnesses had been examined and therefore they were entitled to the summonses when the event contemplated occurred. But the Subordinate Judge declined to issue summonses *then*, because one of the plaintiffs had not come into Court and gone into the witness box though summoned by the defendants. What happened was the defendants wanted to examine one of the plaintiffs, the plaintiff would not come forward and for some reason or other stayed away. But that might be a reason for drawing a presumption against her case on the merits. It is not sufficient to deprive the plaintiffs of the right they had secured under the Subordinate Judge's order. The learned District Judge has treated the refusal by the Subordinate Judge to issue summonses as a matter of discretion. But the previous order of the Subordinate Judge left him no discretion at all. We think therefore that the first point must be decided in favour of the plaintiffs.

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Secondly, the point urged in support of this appeal is that the District Judge has decided the case under the erroneous impression that there is no evidence that Suhrao and his brother had any joint property: the appellants' pleader Mr. Nilkanth has read out to us the deposition of defendant No. 1 in which he says that the two brothers not only lived jointly but he (defendant No. 1) has seen their field and their house. This could only mean that there was a house which Subrao held jointly with his brother. There is also evidence to that effect in the depositions, Exhibits 34 and 35. We also notice that in Exhibit 5 defendant No. 3 says "we borrowed family money of Subrao and Ramchandra" which clearly means that Suhrao and Ramchandra had some nucleus of joint property from which the money came. If all this evidence is believed, then Subrao and Ramchandra must be regarded as having been the members of an undivided Hindu family and in that case, Subrao having pre-deceased Ramchandra, on Ramchandra's death the first plaintiff as his sister and therefore *gotraja sapinda* would be entitled to the property.

The appeal must go back to the District Judge who will remit the case to the Subordinate Judge.

The Subordinate Judge should resume the suit from the point where the defendants' evidence having closed, the plaintiffs had to begin their case. The defendants' witnesses should be summoned and examined. The Subordinate Judge will then remit the record to the District Judge who will after hearing the parties record his findings on the issues already raised and submit them to this Court.

The findings upon the issues must be returned within four months.

HEATON, J.:—I concur in the order proposed. The case was disposed of by the Subordinate Judge after refusing to grant an adjournment. I am exceedingly reluctant to interfere with the discretion which Chapter III of the Civil Procedure Code confers upon Judges in granting or refusing adjournments. The law gives to them the power and it is not for us in any way to limit it, but in this particular case the Subordinate Judge gave what

from the record appears to have been practically an undertaking that the plaintiffs' witnesses should be summoned after the defendants' witnesses had been examined. It seems to me that in so doing he made a grievous mistake; but having done so, he had of himself limited the discretion which the law gave him as to adjournments and when the time came and the plaintiff requested an adjournment to enable him, in fulfilment of the Subordinate Judge's own undertaking, to obtain the attendance of the witnesses, I consider the Subordinate Judge was bound to grant it.

The first issue raised by the District Court being disposed of by the High Court, the Judge after the remand found upon the remaining issues as follows —

(2) The mortgage amount was the joint family property of Subraya and Ramkrishna.

(3) The plaintiffs can recover the rent sought from defendant 1.

(4) The payments of rent by defendant 1 to Gowri did not bind the plaintiffs.

After the said findings were certified to the High Court, they were objected to by the respondents (defendants).

The appeal was heard by Scott C. J., and Chaudavarkar, J.

*S. S. Patkar* for the respondents (defendants) — We object to the findings arrived at by the Judge. He has found in the plaintiffs' favour on the question of title having come to the conclusion that the mortgage debt advanced to the defendants was the joint family property of Subraya and Ramkrishna and they having died, plaintiff 1, their sister, was entitled to the property as heir. But in this case Subraya's widow Gowri, to whose name the khata of the lands was transferred in the revenue records is not a party and a suit for the declaration of right is now pending between her and the plaintiff. We have already paid rent of the years in suit to Gowri and taken receipts from her. We should not be compelled to pay it twice over. The property was mortgaged with possession to Subraya for a period of twelve years on the 14th December 1905 and defendant 1 took possession of the property under a lease for the same period. Subsequently Subraya and Ramkrishna died and

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Gowri took up the management of the property and the lands were transferred to her khata. She, as the widow of Subraya, was the apparent owner and the lands also being transferred to her name, we, in good faith, paid the rents to her and took from her receipts for the same. We had no knowledge that plaintiff 1 was the heir. As tenants we were estopped from denying the title of our landlord Subraya and his widow Gowri.

We further rely on section 50 of the Transfer of Property Act. The ruling in *Jamzedji Sorabji v. Lakshmiram Rajaram*<sup>(1)</sup> supports our contention. It lays down that a person taking a lease from one of several co-sharers cannot dispute his lessor's exclusive title to receive rent or to sue in ejectment.

*N. A. Shiveshvarkar* for the appellents (plaintiffs):—On the bases of the fresh evidence recorded after the remand the Judge came to the correct conclusion that our title was proved and that the defendants were liable to pay us the rent claimed. From the beginning the case has been fought out on the question of title. At first it was found that we had not proved our title and consequently the suit was dismissed. Now that the finding on the question of title has been returned in our favour, it is not open to the defendant, at this late stage, to set up *bona fides* on his part which he did not set up before.

Section 50 of the Transfer of Property Act does not apply. It cannot be made applicable as observed by the Judge "without unduly straining the meaning of the words used". The illustration to the section indicates the class of cases contemplated by the section.

Defendant 1 held the lands as the tenant of Subraya and any payment made to him in good faith would exonerate the defendant from liability to the rightful heir. But directly Subraya died, the defendant could not claim the protection of the section. It was his duty to inquire and to ascertain what persons were entitled to the rent.

*Palkar*, in reply. . . . .

*SCOTT, C. J.*:—This suit was brought by the plaintiffs to recover rent from the first defendant on the ground that he

was the lessee of certain property to which the first plaintiff had become entitled as heir of her deceased brothers.

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The property had come into the possession of the first plaintiff's family by a deed of mortgage, dated the 14th of December 1895, which was executed with possession in favour of Subraya although the mortgage money was advanced by Subraya on behalf of himself and his younger brother. On the same date, the 14th of December 1895, Subraya in his own name granted a lease of the property for 12 years to the first defendant Subraya after some years died, his interest as mortgagee surviving to his younger brother Ramkrishna. Ramkrishna thereafter died and the person who became entitled as his heir was the first plaintiff. The first plaintiff, however, did not live with her brothers and upon the death of Ramkrishna the property was taken possession of and managed by Subraya's widow Gowri, who after Ramkrishna's death in the year 1901, got her name placed on the *Mata* as the owner of the property. While she was thus the apparent owner of the property she demanded rent from the first defendant and he paid her rent for the year 1902 and the year 1903. It is for these years that the plaintiffs now seek to recover rent from the first defendant on the ground that Gowri had no authority to receive rent and give a discharge for the same.

At the time that the first defendant paid these rents to Gowri the tenancy was still continuing and he was, therefore, estopped as against Subraya, the nominal lessor, and Subraya's heir Gowri from disputing their right as landlords. He could not have defended a suit for rent brought against him by Gowri.

It is also apparent from the findings of the District Judge that the defendant in making the payment to Gowri was acting in good faith. He had no notice of the plaintiffs' interest in the property. We think that it is a case calling for the application of section 50 of the Transfer of Property Act which runs as follows—

No person shall be chargeable with any rents or profits of any immovable property, which he has in good faith paid or delivered to any person of whom he in good faith held such property, notwithstanding it may afterwards appear that the person to whom such payment or delivery was made had no right to receive such rents or profits.

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It has been contended on behalf of the plaintiffs that section 50 has no application to a case in which there has not been an assignment by the lessor during the tenancy

The section, however, is not in terms limited to such cases and, we think its language is general enough to cover the case before us. We must therefore hold that the first defendant is not chargeable with the rents sued for, and we therefore confirm the decree of the lower Court and dismiss the suit.

The defendant in the course of the suit raised contentions as to the right of the plaintiff as heir of her brother Ramkrishna and it became necessary to investigate closely the rights of Subraya and Ramakrishna with reference to the property in question. In those contentions the defendant has failed. For these reasons we think that the proper order as to costs will be that each party do bear her or his own costs throughout.

*Decree confirmed*

G B R

## APPELLATE CIVIL

*Before Chief Justice Scott and Mr Justice Batchelor*

1903

October 7

BAI MANI AND ANOTHER (ORIGINAL PLAINTIFFS—PETITIONERS)  
APPELLANTS v. KUMICHAND GOKALDAS (ORIGINAL DEFENDANT 1—  
OPPOSITE) RESPONDENT \*

*Civil Procedure Code (Act XIV of 1859), sections 503, 505, and 588—  
Recommendation by Subordinate Judge of a person to be appointed receiver—  
Refusal by District Judge—Appeal*

A Subordinate Judge recommended to the District Judge that a certain person be appointed receiver and in view of the recommendation not being accepted the Master of the Court should be appointed. The District Judge refused to authorize the Subordinate Judge to appoint either of the persons so recommended.

Against the order of the District Judge an appeal was preferred to the High Court.

*Held*, that no appeal lay. The District Judge's order was passed under section 505 of the Civil Procedure Code (Act XIV of 1893) and not under section 503. It was therefore an order which was not appealable not being specified in the list of orders in section 589.

*Birajan Koor v Ram Churn Lall Mahata* (1), followed.

APPEAL against an order passed by W. Baker, District Judge of Surat, in Miscellaneous Application No. 33 of 1903.

One Savachand Ichhachand died on the 27th July 1902 leaving him surviving a widow Bai Mani and a minor son Khimchand. Bai Mani being an illiterate woman and being unable to manage the property which included a sum of Rs. 23,400 of her minor son, appointed four trustees to manage the property. The name of one of the trustees was Khimchand Gokaldas. Subsequently Bai Mani for herself and as next friend of her minor son brought a suit, No. 35 of 1907, against Khimchand Gokaldas and the other trustees in the Court of the First Class Subordinate Judge of Surat, for an account and for carrying out the trusts under the deed by which the defendants had been appointed trustees. Before the suit came on for hearing Bai Mani applied under section 503 of the Civil Procedure Code (Act XIV of 1892) for the appointment of a receiver. The Subordinate Judge after hearing both the parties nominated defendant Khimchand Gokaldas himself as the receiver and in case of his not consenting to accept the office, appointed the Nazir of his Court to be the receiver and submitted the nomination to the District Judge under section 505 of the Code.

The District Judge declined to make the appointment holding that there was no necessity for the appointment and that "to appoint a receiver is to commit the Court to the view that the plaintiff's interpretation of the document and not the defendant's interpretation is correct."

Against the said order Bai Mani and her minor son appealed. *Settled* (with *Manubhai Nanabhai* and *N. K. Mehta*) for the appellants (plaintiffs—petitioners).

*Branson* (with *K. N. Koyaji* and *M. V. Karbhari*) for the respondent (defendant 1—opponent).—We raise a preliminary



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objection that the order of the District Judge is not appealable. The order was passed under section 505 of the Civil Procedure Code and section 588 of the Code does not provide for an appeal against such order.

*Set aside* for the appellant.—The governing section is 503 of the Code. It is the substantial section in the Chapter in which it occurs. Section 505 only extends the powers given by section 503 to Subordinate Judges. Looking to the policy of the Code it allows an appeal against an order appointing a receiver. Therefore there is greater reason that an appeal should be allowed against an order refusing to appoint a receiver. Again when an order is passed by a competent Court under section 503 either appointing or refusing to appoint a receiver, an appeal will lie against that order. Necessarily then an appeal will lie from an order refusing to appoint a receiver on the recommendation of the Subordinate Judge under section 505. The District Judge in the present instance really acted under section 503 and the order passed by him is appealable. *Tenkatasani v Stridharamma*<sup>(1)</sup>, *Sangappa v Shirbasawa*<sup>(2)</sup>, *Dordya Nath Adya v Malhar Lal Adya*<sup>(3)</sup>, *Khagendra Narain Singh v. Shashudhar Jha*<sup>(4)</sup>.

*Branson*, in reply, referred to *Birajan Koor v. Ram Churn Lall Mahata*<sup>(5)</sup>.

SCOTT, C. J.—This is an appeal from an order of the District Judge of Surat in Miscellaneous Application No 33 of 1903 of the District file. That application was one in which the District Judge considered the recommendation of the First Class Subordinate Judge of Surat that the defendant Khimchand should be appointed a receiver in a suit No 35 of 1907, and, in case of the recommendation not being accepted, that the Nazir of his Court should be appointed.

The District Judge having considered the recommendations refused to authorise the Judge to appoint either of the persons so recommended.

(1) (1896) 10 Mad 179.

(2) (1897) 24 Bom 24.

(3) (1890) 17 Cal. CSO at p. 692.

(4) (1901) 31 Cal 42.

(5) (1891) 7 Cal 719.

The application was made to him under the proviso to section 505 of the Civil Procedure Code, and under that section he had power to authorise the Subordinate Judge to appoint one of the persons recommended and he had also power to pass any other order. The order which he decided to pass was to refuse to allow the appointment of any receiver at all.

We are of opinion that that was an order passed under section 505, and not under section 503. It is therefore, an order which is not appealable not being specified in the list of orders in section 599. We are supported in this conclusion by the decision of *Birajan Koorer v Ram Churn Lal Mahata*<sup>(1)</sup>.

We, therefore, think, that the preliminary objection which has been taken that no appeal lies is a good one, and we dismiss the appeal with costs.

*Appeal dismissed*

G B R

(1) (1881) 7 Cal 719

## APPELLATE CIVIL

*Before Chief Justice Scott and Mr Justice Heato*

PUTLABAI KUM SADASHIV (ORIGINAL DEFENDANT APPELLANT) 1  
MAHADU WALAD SADASHIV (ORIGINAL PLAINTIFF) RESPONDENT \*

1009

*October*

*Hindu widow—Gift of a son by first husband in adoption by widow after her re-marriage—Hindu Widow's Re-marriage Act (XV of 1856) sections 2, 3, 4 and 5*

According to the texts the right of a female parent to give her son in adoption results from the maternal relation and is not derived by delegation from her husband. Assuming that the mother has by Hindu Law a right to give her son in adoption the Hindu Widow's Re-marriage Act (XV of 1856) does not afford any indication that the legislature intended to deprive her of it.

The right of guardianship which under the provisions of Act XV of 1856 section 3 may under certain conditions be transferred from the mother to one of the other relations of the child does not carry with it the right to give in adoption for that is a right which can only be exercised by a parent.

*Panchappa v Saigambasa* (1) considered

\* Second Appeal No. 205 of 1907

1) (1899) 24 Bom. 89

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v  
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APPEAL against the decision of Pandurng Shridhar Pathak, First Class Subordinate Judge of Dhulia in the Khândesh District, in Suit No 407 of 1907

The plaintiff, who was a minor represented by his next friend Vithal Naroha Shimpi, sued for a declaration that he was the legally adopted son of his maternal grandfather Sadashiv and for a perpetual injunction restraining the defendant from doing any acts prejudicial to the plaintiff's interest and inconsistent with his right of ownership over Sadashiv's property. The plaintiff alleged that his natural mother Bhagi was the only child of Sadashiv and that she and her husband Anas lived with Sadashiv and the plaintiff was born in Sadashiv's house, that Sadashiv brought up the plaintiff as his son after obtaining the consent of the plaintiff's parents for his adoption, that the plaintiff's father had authorized before his death his wife, that is plaintiff's mother, to perform the ceremony of adoption whenever Sadashiv wished to do so that after Sadashiv's death his divided brother Balu having laid claim to his property the claim was resisted by Putli who was the fourth wife of Sadashiv, that the litigation between them went up to the High Court and Putli succeeded in securing the property from Balu that the plaintiff was adopted by Putli as son to Sadashiv on the 21st April 1906 under a registered deed of adoption and he was given in adoption by his mother Bhagi and that Putli having subsequently deeded the legality of the plaintiff's adoption, he brought the present suit.

The defendant having failed to file a written statement she was examined by the Court and she made a statement deaying the *fictum* of adoption and the execution of the deed of adoption. At the hearing it was contended on her behalf that though the plaintiff's adoption was proved, it was illegal inasmuch as the plaintiff's mother Bhagi had re-married a second husband before the adoption, the plaintiff was at the time of the adoption an orphan and so incapable of being taken or given in adoption.

The Subordinate Judge found that the plaintiff was adopted by the defendant and the adoption was legal, that the deed of adoption was proved and that the plaintiff was entitled to the reliefs claimed. He, therefore, made a declaration that

the minor plaintiff was the legally adopted son of Sadashiv and granted a perpetual injunction prohibiting and restraining the defendant from doing any act in connection with her husband's estate that would in any way interfere with the plaintiff's right as the adopted son of the deceased Sadashiv. In his judgment the Subordinate Judge made the following observations —

I shall now address myself to the consideration of the contention seriously pressed by Mr Chandorkar for the defence. His contention is that, although the adoption is proved, it is illegal inasmuch as the boy—the plaintiff—was an orphan at the date of the adoption and so incapable of being legally taken or given in adoption. In connection with this argument it must be borne in mind that the natural mother of the plaintiff had contracted a *monohur* or *pat* marriage with Vithal before she gave the plaintiff in adoption to the defendant. It is argued that by her re marriage Bhagi lost all her rights in her late husband's (i.e. plaintiff's natural father's) family and had consequently no disposing power left in her and the minor plaintiff must be treated as an orphan. The Hindu Law as well as the Statute Law (Act XV of 1856 sections 2 and 3) bearing on the point have been discussed by the Bombay High Court in *Panchappa v Sangambasawa* (I L R 24 Bom, p 89) wherein earlier authorities on the same question have all been considered. It is held by the High Court that a Hindu widow has no power—after her re marriage—to give in adoption her son by her first husband, unless he has expressly authorized her to do so. It is remarked by Ransde, J, at page 94 that if “she (Hindu widow) cannot take in adoption she cannot for the same reason give a son in adoption after re marriage. It is true section 5 of the Act reserves to the widow certain rights of inheritance not covered by the exceptions in clauses 2, 3 and 4. It cannot however be contended that the right of giving a son in adoption is of the nature of a right reserved to her by section 5. It is a right subordinate to the right of inheritance from her husband and the guardianship of her sons, both of which rights are excepted by name in sections 2 and 3 of the Act. . . . The right to give a boy in adoption is a right of disposition a portion of *patria potestas* which comes to the widow by reason of her connection with her deceased husband's estate, and, being a part of the rights and interests she acquires as a widow, it is included within the provisions of sections 2 and 3 of the Act, and is not a reservation which the Act concedes to the widow. The adoption of the plaintiff would, no doubt, be illegal on the authority of this case. The case under consideration is however, distinguishable from the one quoted above in two or more important particulars. In the first place there is evidence in the case to show that Bhagi was authorized by her first husband Nana (Anna) to give the boy in adoption. The authority is, no doubt, not in writing, but as already remarked I am not prepared to disbelieve the oral evidence on the point. It is the evidence of Bhagi herself. In the second place, it seems quite clear from the evidence furnished by extracts from the school registers that the boy was

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treated by Sadashiv himself as his son as long since as 1901, i. e., long before the death of plaintiff's natural father Narayan (Anna P). Thirdly in Panchappa's case the adoption was disputed not by the person who made the adoption as is the case in the present case but by the sister of the person to whom the adoption was made. In this case it was the defendant who made the adoption under competent legal advice. She is in my opinion legally estopped from disputing the validity or legality of the adoption. The reversioners of the deceased Sadashiv may do so, but the defendant cannot. Fourthly, it must be noted that even apart from adoption, it is the plaintiff who is the legal heir of the deceased Sadashiv and is as much entitled to inherit his estate unless of course the defendant made a valid adoption in which the inheritance would go to the boy adopted. However as I hold that Bhagi had authority from her first husband to give the boy in adoption and that the adoption is therefore legal and valid the contingency of second adoption by the defendant cannot arise.

The defendant appealed.

*M V Bhat* for the appellant (defendant) — We do not contest the *factum* of adoption but we impeach it as illegal. The plaintiff's mother Bhagi had taken a second husband before his adoption by the defendant. Therefore at the time of the adoption the plaintiff was an orphan. At that time Bhagi was no longer the widow of the plaintiff's father. By her second marriage she lost all her rights in the first husband's family and had consequently no disposing power left in her in that family. Three things are essential to a valid adoption, namely (1) the capacity to take in adoption, (2) the capacity to give in adoption and (3) the capacity to be validly taken in adoption, that is the capacity of the adoptive mother to take, the capacity of the natural mother to give and the capacity of the boy to be adopted. The Hindu Law as well as the Statute Law, namely, the Hindu Widow Remarriage Act and earlier authorities bearing on the point involved in the present case have been fully discussed in *Panchappa v Sangambatawa*<sup>(1)</sup> and the observations of Ranade, J., fully support our contention. Owing to Bhagi's remarriage she ceased to be the widow of her first husband and so far as the plaintiff was concerned, she became a mother civilly dead. Therefore there was no capacity in her to give the plaintiff in adoption when he was adopted by Puth.

*S R Gokhal* for the respondent (plaintiff).—The *factum* of adoption being admitted, the only important question to be considered is whether the plaintiff's adoption was, as held by the lower Court, legal. First of all the evidence in the case clearly shows that the plaintiff's mother Bhagi was authorized by her first husband, that is, the plaintiff's father to give the plaintiff in adoption to Sadashiv and that Sadashiv all along treated the plaintiff as his son. Only the ceremony of adoption was not performed during Sadashiv's life-time and it was performed subsequently by his widow. It is true that at the time of the adoption Bhagi, plaintiff's mother, had taken a second husband but by her re-marriage she did not cease to be the plaintiff's mother and that being so, she as mother had full authority to give the plaintiff in adoption to Patti. The Hindu Widow Re-marriage Act disqualifies a re-married woman from claiming certain rights in her first husband's family, but it does not affect blood relationship. It has been held that a re-married woman is entitled to succeed as heir to her son by the first husband. *Chamar Haru v Kashi*<sup>(1)</sup>, *Basappa v. Rayappa*<sup>(2)</sup>

Certain observations of Ranade, J., in *Panchappa v Sangambasawa*<sup>(3)</sup> were relied on for the appellant, but the point involved in that case was similar to the one now under consideration and it was therein held that the adoption was invalid for absence of authority from the first husband, while such authority has been proved in the present case. Therefore that ruling supports our contention.

It has been held that conversion to Mahomedanism does not debar the convert father from sanctioning the adoption of his Hindu son. *Shamsing v Santabu*<sup>(4)</sup>. Though such a convert cannot himself go through the ceremony of giving the son in adoption he can sanction the adoption and get the ceremony performed by some one else. Therefore giving the plaintiff in adoption by Bhagi being sanctioned by her first husband, the act of giving was merely a continuation of the sanction.

*Bhat* in reply.

(1) (1902) 26 Bom. 288.

(2) (1901) 25 Bom. 91.

(3) (1896) 21 Bom. 59.

(4) (1901) 25 Bom. 551.

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SCOTT, C J —The question in this appeal is whether the plaintiff has been validly adopted as a son to his deceased maternal grandfather Sadashiv. The question has been answered in the affirmative in the lower Court

The material facts are as follow —

The plaintiff is the natural son of Anna and Bhagi. Bhagi is the daughter of Sadashiv. Anna, Bhagi and the plaintiff lived with Sadashiv. Bhagi says that her father intended from the first to adopt the plaintiff, that her husband asked him to do so and when attacked with plague told Sadashiv that the boy was given to him. This story is highly probable for Sadashiv was a well to do man possessed of property worth Rs 25,000 or 30,000 while Anna had no property whatever. At intervals of a few months the deaths occurred of, first, Anna, then, Sadashiv and lastly, Bhowani, Bhagi's mother. Sadashiv had another wife Putli, the defendant in this suit. After Sadashiv's death Putli and Bhagi and the plaintiff lived together in Sadashiv's house until they were driven out by Balu, the divided brother of Sadashiv. Balu's action led to litigation between him and Putli in which Putli eventually secured from him all Sadashiv's property. For about 3 years Putli continued to treat the plaintiff as before as the son of Sadashiv. She also in April 1906 went through a formal adoption ceremony in which the plaintiff was given by Bhagi and taken by Putli as son to Sadashiv. A deed of adoption was then executed by Putli in the plaintiff's favour.

At this time Bhagi was no longer the widow of Anna having re-married about a year previously. In August 1906 previously Putli denied the validity of the adoption and this suit was then filed on behalf of the plaintiff to establish it.

The plaintiff's adoption is challenged by the defendant on the ground that he was owing to his mother's re-marriage an orphan in the eye of the law at the time of the adoption ceremony, without any parent capable of giving him in adoption.

We will first consider the right of a mother to give her son in adoption according to the Hindu Law.

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PUTTALABAI

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MAHARU

According to the texts the right of the female parent to give her son in adoption results from the maternal relation and is not derived by delegation from her husband. Thus Manu IX 168 'that (boy) equal by caste whom his mother or his father affectionately gives with water in time of distress as son must be considered as an adopted son'

Yajñavalkya II 130 'the son whom his father or mother gives becomes Dattaka. Vashista XV, 1, 2 'man formed of uterine blood and virile seed proceeds from his mother and his father as effect from cause, therefore the father and the mother have power to give, to sell and to abandon their sons'. The Mitakshara which is the paramount authority in that part of the country to which the parties belong has the following comment—Bk. 1, Section XI, 9 and 10 —'9 He who is given by his mother with her husband's consent while her husband is absent or incapable though present or without his assent after her husband's decease or who is given by his father or by both being of the same class with the person to whom he is given becomes his given son, so Manu declares "He is called a son given whom his father or mother affectionately gives as a son being alike by class and in a time of distress confirming the gift with water" 10. By specifying distress it is intimated that the son should not be given unless there be distress. This prohibition regards the giver, not the taker'

Thus apart from the effect of special legislation which we will next consider, the maternal relationship of Bhagī justified the gift in adoption.

In Mandlik's Hindu Law p 463 we find the following passage which accords with the conclusion at which we have arrived. "The widow's power of giving in her own right has, by some, been questioned, but, as it seems to me, on very insufficient grounds. In point of fact, even the texts by themselves are more clearly in favour of her competency to give, than her ability to take, and all the Digests held authoritative on this side of India, are equally pronounced in her favour. Nanda Pandita himself, though he would wish for permission for a widow to take, is obliged to hold that Manu's text being express in favour of the mother or the father being able to give, the widow has the right to give."



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v.  
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It has however been argued before us that the effect of the Hindu Widow Re-marriage Act XV of 1856 is to deprive a re-married widow of all rights resulting from her first marriage and even of the right to act as guardian of her child. We are unable to agree with this contention.

Section 3 of the Act is as follows —

On the re-marriage of a Hindu widow, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the deceased husband the guardian of his children the father or paternal grandfather or the mother or paternal grandmother, of the deceased husband, or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in civil cases in the place where the deceased husband was domiciled at the time of his death for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court, if it shall think fit, to appoint such guardian, who when appointed shall be entitled to have the care and custody of the said children, or of any of them during their minority, in the place of their mother, and in making such appointment the Court shall be guided, so far as may be, by the laws and rules in force touching the guardianship of children who have neither father nor mother

Provided that, when the said children have not property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother unless the proposed guardian shall have given security for the support and proper education of the children whilst minors

It is to be observed first that the proviso preserves the right of the re-married mother to the guardianship of her children when they have no property of their own even from the interference of the Court except in cases where a grandfather or grandmother or male relative of the dead father has given security for the support and education of the children: secondly that even where there is no property of the children the Court has a discretion to refuse the application for the removal of the children from the guardianship of the mother.

Her right as mother to act as guardian of children not possessed of property is therefore but slightly affected by the Act.

Assuming that the mother has by Hindu Law a right to give her son in adoption, we do not think that the Act affords any indication that the legislature intended to deprive her of it.

Section 5 says that a widow, except as in the three preceding sections is provided, shall not by reason of her re marriage forfeit any property or any right to which she would otherwise be entitled. Accordingly a re married woman has been held entitled to succeed as heir to her son by her first husband see *Chamar Haru v Kashi*<sup>(1)</sup> and *Basappa v Rayala*<sup>(2)</sup>

1901  
PILGRIM  
MAHARAJA

The right of guardianship which under the provisions of section 3 (one of the sections excepted in section 5) may under certain conditions be transferred from the mother to one of the other relations of the child does not carry with it the right to give in adoption, for that is a right which can only be exercised by a parent

It is however contended that the matter is not open to argument because it has been held by a Bench of this Court in *Pandappa v Sangabasa*<sup>(3)</sup> that a Hindu widow has no power after her re marriage to give in adoption her son by her first husband unless he has expressly authorised her to do so. These are the terms of the head note and appear to express the opinion of Parsons, J. one of the Judges who decided that case.

In our opinion the evidence to which we have referred in the earlier part of the judgment is good evidence of an express authority from Anna to Bhagi to give the plaintiff in adoption to Sadashiv. The adoption would therefore according to the opinion of Parsons, J., be valid.

For the above reasons we dismiss the appeal with costs

*Appeal dismissed with costs*

O B R

(1) (1900) 28 Bom 358

(2) (1904) 22 Bom 91

(3) (1892) 21 Bom 89

## APPELLATE CIVIL.

*Before Mr Justice Batchelor and Mr Justice Heaton*

1939,  
October 15

ADAM UMAR SALE (ORIGINAL DEFENDANT No 1) APPELLANT, v  
BAPU BAWAJI AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS  
Nos 2-8), RESPONDENTS.\*

*Bhagdari Act (Bombay Act V of 1862) sec 3—Bhag—Unrecognised sub-division of a bhag—Alienation—Suit to set aside the alienation—Limitation*

Possession acquired under an alienation made in contravention of section 3 of the Bhagdari Act (Bombay Act V of 1862) can become adverse so as to bar a suit for recovery by the individual alienor or his representatives in interest

The Bhagdari Act (Bombay Act V of 1862) contains nothing which by express provision or necessary implication abrogates the law of limitation in favour of a private person

*Dala v Parag*(1) and *Jethabhai v Nathabhai*(2), distinguished

SECOND appeal from the decision of G D Madgaonkar, District Judge of Broach, confirming the decree passed by K V. Desai, Subordinate Judge of Broach

Suit to recover possession of land

The piece of land in dispute formed an unrecognised sub-division of a *bhag*. The ancestors of the plaintiff sold it to the ancestors of defendants Nos 1, 2 and 3 in the year 1863, that is, after the introduction of the Bombay Bhagdari Act in 1862. The sale was opposed to the spirit of section 3 of the Act.

The plaintiff filed this suit in 1905, to recover the possession of the land from the defendants, alleging that the sale having been void under section 3 of the Act could confer no right or title on the defendants.

The Subordinate Judge decreed the plaintiff's claim. It was upheld on appeal by the District Judge on grounds which he stated as follows —

As to the plea of adverse possession it is to be observed that the defendants raised no such issue in the lower Court. The plaintiff himself no doubt states that

\* Federal Appeal No. 112 of 1939

(1) (1903) 4 Bom L.R. 77

(2) (1931) 29 Bom 399; 6 Bom L.R. 423.

defendant No. 1 has been in the possession since the sale, that is considerably over twelve years prior to the suit. But there is no clear issue nor evidence as to how far this possession was adverse to plaintiff apart from any presumption that may be made from plaintiff's ancestor being one of the vendors.

Further, it is now settled law that adverse possession for however long a period is no bar to ejectment by the Collector under section 3 of the Bhagdari Act. *Collector of Broach v. Rajaram*, 1 L. R. 7 Bom 542, 543, *Dai Dala v. Parag* 4 Bom L. R. 797 *Jethabhai v. Ananabhai*, 1 L. R. 28 Bom 399.

But the English rule 'Prescription runneth not against the Crown' does not hold good in India, in point of limitation except where specially protected by law, the Crown and its officers stand on the same footing as any other parties.

There is no such special exemption in the Bhagdari Act the words 'whenever he shall, upon due inquiry &c., can hardly be said to extend the period of limitation. In the cases cited above the *ratio decidendi* was really the fact that the legislature for special reasons of policy, had absolutely made illegal and invalid *ab initio* all alienations of unrecognised subdivisions, so that possession under such alienations by a stranger non bhagdari could never by mere lapse of time be recognised by the Courts as legal possession. If so, there seems no clear reason why the plaintiff instead of moving the Collector to take action and, if action were taken in his favour, of leaving the appellant to apply to the Court to set aside the Collector's order should not himself directly apply to the Court to reinstate him in possession, or, when he so applies, why possession of itself should bar his remedy direct any more than it does so indirectly through the Collector. The point of adverse possession cannot thus really arise in the case. To use the words of Chundavarkar, J., in *Jethabhai v. Nathabhai*, 1 L. R. 28 Bom 497 'it is of the essence of adverse possession that it must relate to some property which is recognised by law. But here there is no such property, since the legislature has proscribed the kind of property on which the plaintiffs seek to found their title by adverse possession.' In respect of the resulting hardship, if any, to defendants, one can but quote the words of Jenkins C. J., in *Dala v. Parag* (1 Bom L. R. 799) 'Great hardship may possibly arise from time to time by the exercise of these powers, but this is not an unfrequent result of legislation of this class and we cannot on this ground help the plaintiff, for "Courts must look at hardships in the face rather than break down rules of law."'

*L. A. Shah*, for the appellant (defendant No. 1) — It has been found as a fact that the sale took place in the year 1863 A. D., and ever since the possession has been with the defendant. The present suit, which is brought more than forty years after that date, is therefore time barred (see section 28 and Article 114 of the Limitation Act), unless there is something in the Bhagdari Act (Bombay Act V of 1862) to exclude the operation provisions of the Limitation Act, 1877.

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HAFU  
I AWASTI

We submit there is nothing in the Bhagdari Act, 1862, to exclude the operation. The cases of *Dala v. Parag*<sup>(1)</sup> and *Jethabhai v. Nathabhai*<sup>(2)</sup> are distinguishable from the present case inasmuch as there the Collector had initiated the proceedings, and the question was whether his action was subject to any provisions of the Limitation Act, 1877. In the case of *The Collector of Broach v. Desai Raghunath*<sup>(3)</sup>, the proceedings were under section 2 of the Bhagdari Act (Bombay Act V of 1862). In *Dala v. Parag*<sup>(1)</sup> the learned Chief Justice relied upon the expression "whenever it shall appear" in section 3 of the Bhagdari Act, and held that the plea of adverse possession could not prevail against the Collector's order. In the case of *Jethabhai v. Nathabhai*<sup>(2)</sup> also the Collector had passed the order and the plaintiff was seeking to get rid of the effect of that order. The general remarks of Chandavarkar J., must be taken with reference to the facts of the case, the point arising in this appeal not having been argued in that case.

*G N Thakore* (for *M. N. Mehta*) for the respondent.—The Limitation Act does not control the transactions in question in contravention of the Bhagdari Act. In *The Collector of Broach v. Desai Raghunath*<sup>(3)</sup>, where the Collector's action fell under section 2 of the Bhagdari Act. In *Dala v. Parag*<sup>(1)</sup> and *Jethabhai v. Nathabhai*<sup>(2)</sup> the Collector's action fell under section 3 of the Act. These cases are not distinguishable from the present case on the ground that the Collector's action intervened in each of them, while in the present case there is no order of the Collector. Besides, the remarks of Chandavarkar J., which form part of the decision of the case, are clearly in favour of the view that the policy of the Act is to make the transaction contravening its provisions unlawful, and null and void in law. I strongly rely on the said remarks.

*BATCHELOR, J.*—This appeal raises a question as to the construction of the Bhagdari Act (Bombay Act V of 1862). The plaintiff sued to recover possession of a parcel of land alleging that it formed part of a *bhag* which was his ancestral property,

(1) (1902) 4 Bom. L. R. 797.

(2) (1904) 28 Bom. 309. 6 Bom. L. R. 493.

(3) (1887) 7 Bom. 516.

and that in 1863 it and some other land were sold in contravention of the Bhagdari Act, by his ancestors and those of defendants 4 and 5 to the ancestors of others of the defendants. It is admitted that the land in suit is an unrecognised subdivision of a *bhag*, and it is found as a fact by the Court below that the sale to the defendants' predecessors took place in 1863, that is, after the coming into force of the Bhagdari Act.

The learned District Judge has allowed the plaintiff's claim on the grounds that the sale of 1863 was void under section 3 of the Bhagdari Act, and that no adverse possession of the land could be acquired by the first defendant so as to bar the suit under the law of limitation. Though other questions have been slightly discussed before us on behalf of the first defendant, who is the appellant here, it appears to me that the only point of substance is that which has reference to the Limitation Act. It is common ground that the sale of 1863 was void under section 3 of the Bhagdari Act, and upon a consideration of the pleadings and the general conduct of the suit I am satisfied that the suit must be held to be barred by limitation unless it can be saved by virtue of the special provisions of the Bhagdari Act. Though no issue as to limitation was raised in the trying Court, the point was taken in the first defendant's written statement, and has been discussed by the Judge below, having regard to these circumstances and to section 4 of the Limitation Act, I think that Mr. Shah is entitled to argue the question of limitation in this appeal.

Now the argument which found favour with the lower appellate Court, and which accordingly the appellant has now to displace, is that possession acquired under an alienation made in contravention of section 3 of the Bhagdari Act can never become adverse so as to bar a suit for recovery by the individual alienor or his representatives in interest. This argument is grounded upon the general scheme and policy of the Act, and upon certain judicial decisions.

As to the scheme of the Act, it is apparent from the title, the preamble and the sections that the Act is a special or exceptional piece of legislation designed with the view to prevent the dismemberment of Bhagdari tenure. To give effect to this policy

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the legislatures directs in section 1 of the Act that no portion of a *bhag*, other than a recognised sub-division of such *bhag*, shall be liable to seizure under the process of any Civil Court. Then by section 2 it is provided that on the issue of any such process for the seizure of any unrecognised portion of a *bhag*, the Collector may move the Court to set aside the process, and if the Court finds that the case falls within the Act, "it shall set aside or quash such process, and cause the provisions of this Act to be put in force" Then follows section 3, with which we are more immediately concerned in this appeal. It begins by reciting that "it shall not be lawful to alienate or incumber any portion of a *bhag* other than a recognised sub-division of such *bhag*, and the second paragraph enacts that any alienation contrary to the provisions of the section "shall be null and void, and it shall be lawful for the Collector . . . whenever he shall, upon due inquiry, find that any person is in possession of any portion of any *bhag* . . . other than a recognised sub-division of such *bhag* in violation of any of the provisions of this section, summarily to remove him from such possession, and to restore the possession to the person whom the Collector shall deem to be entitled thereto" Then by the third paragraph it is laid down that any suit brought to try the validity of any order made by the Collector in the exercise of the above powers must be brought within three months after the execution of such order.

It has been held by this Court in decisions which are binding upon us that under section 3 of the Act the Collector may take action at any time, that his action is not subject to the law of limitation, and that the plea of adverse possession cannot prevail against any order which he may make: see *Ditta v. Parag*<sup>(1)</sup> and *Jethabhai v. Nathabhai*<sup>(2)</sup>. A reference to the former case will show how this principle is deduced from the general scheme of the Act and from the particular words authorising the Collector to take action whenever he shall find any person in apparently unlawful possession. But in this case no action has been taken by the Collector. It is the plaintiff himself who now seeks to disturb a possession extending over 40 years, and the question

(1) (1902) 4 Bom. L. J. 79. (2) (1903) 25 Bom. 399 C. Bom. L. J. 428



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The performance of the Muktd ceremonies is a religious duty imposed on the Zoroastrians by the proved tenets of the religion they profess.

The ceremonies themselves are acts of religious worship. They include worship, praise, and adoration for the Supreme Deity, and a thanksgiving for all his mercies. They contain petitions for benefits, both temporal and spiritual, for all /roastrians—for all holy and virtuous men of all other communities—and they comprise prayers for the well being and long reign of the sovereign, for good government by him, and for victory to him over all his enemies. The Mukht ceremonies tend most unambiguously towards the advancement of the religion promulgated by the Persian Prophet Zoroaster, and there can be no doubt that the performance of these ceremonies is an act of Divine Worship in its highest and truest sense.

long way to maintain the priestly classes whose existence is necessary to the community of Zoroastrians.

According to the belief prevailing amongst the faithful followers of the Prophet Zoroaster, the performance of the Mukhad ceremonies confers public benefits—benefits on the Zoroastrian community, on the peoples amongst whom they live and upon the country which they have chosen as their home. The fundamental principle underlying this belief is faith in the efficacy of prayers addressed to the Great Creator.

A Judge sitting on the original side is bound ordinarily to follow the judgment of another Judge when he has decided a point of law or laid down judicially construed any provision of law. A single Judge is not bound to follow the decision recorded by him, so a Judge in a later case may be faller or more reliable and may tend to lead him to a different conclusion.

*Lamy, Nouroji Banaji v. Bapuji Ruttonj Lambunalla* (1887) 11 Bom 111 not followed.

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is whether the immunity from limitation, afforded to the Collector under the Act, should be extended also to a private party. I can find no warrant in the Act for that opinion, on the contrary, the policy of the Act, as I read the sections which I have endeavoured to summarise, is to vest in the Collector alone the special powers of interference conferred, leaving private parties to the operation of the ordinary law. And this view derives support from the consideration that the Collector is in a better position than the Civil Court to carry out the special objects of this particular Act with due regard to the aims of the Government as well as to any equities which may exist between the parties. But there is I think nothing to indicate that the exceptional position conferred on the Collector can be acquired by a party who after standing by for 40 years comes direct to the Court instead of availing himself of the special remedy provided by the Act. Reliance was placed by Mr. Thakore upon a passage in Chandavarkar, J.'s judgment in *Jetha'hai's* case<sup>(1)</sup> where it was said that, on principle, such a title as the plaintiffs in that suit claimed to have acquired, could not be acquired by adverse possession. But this passage as the following sentences clearly show, had reference to the particular claim advanced by the then plaintiffs who professed to hold the land as forming part of a *narva* holding and as subject to all the incidents of the tenure. No such claim is put forward here and the passage is therefore inapplicable to the present facts.

Then it was said that the possession obtained by the first defendant's predecessor was possession obtained through a transaction which the law both prohibits and declares to be null and void. That is undoubtedly so, but it supplies no reason for supposing that such possession would not be adverse to the rightful owner. On the contrary, it is just such possession as this that is possession originating without colour of title, which is contemplated by the law of limitation: so in the *President and Governors of Magdalen Hospital v. Annotts*<sup>(2)</sup> possession obtained under void leases was held to be adverse. It is important to distinguish between the sale and the possession. The sale, no

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(1) (1904) 23 Bom. 599; 6 Bom. L. R. 425. (2) (1879) 4 App. Cas. 324.

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JAWAG,

doubt, was void, and the law allowed the vendors ample time in which to have it set aside. But the appellant does not rest upon the rule; he takes his stand on the long possession following the sale, and the effect of that possession is not displaced by reference to its origin. So far as I can discover, the Act contains nothing which by express provision or necessary implication abrogates the law of limitation in favour of a private person.

For these reasons I am of opinion that the appeal should be allowed and that the suit should be dismissed with costs throughout.

*Appeal allowed*  
L. P.

## ORIGINAL CIVIL.

*Before Mr. Justice Davar*

JAMSHEDJI OURSLTIEE TARACHAND, PLAINTIFF, v SOONABAI  
AND OTHERS, DEFENDANTS.\*

1907,  
December 2.

*Trusts to perform Muktd ceremonies, validity of—Tenets of Zoroastrian faith—Nature and meaning of Muktd ceremonies—Ceremonies tending towards the advancement of religion—Practice—How far decision by single Judge binding on his successors.*

Trusts and bequests of lands or money for the purpose of devoting the incomes thereof in perpetuity for the purpose of performing Muktd, Baj, Yajushni, and other like ceremonies, are valid "charitable" bequests and as such exempt from the application of the rule of law forbidding perpetuities.

The Farvardigan days are the most holy days during the Zoroastrian year and the performance of Muktd ceremonies during the Farvardigan days is enjoined by the Scriptures of the Zoroastrian religion.

The performance of the Muktd ceremonies is a religious duty imposed on the Zoroastrians by the proved tenets of the religion they profess.

The ceremonies themselves are acts of religious worship. They include worship, praise and adoration for the Supreme Deity, and a thanksgiving for all his mercies. They contain petitions for benefits, both temporal and spiritual, for all Zoroastrians—for all holy and virtuous men of all other communities—and they comprise prayers for the well being and long reign of the sovereign, for

good government by him, and for victory to him over all his enemies. The Muktad ceremonies tend most unmistakably towards the advancement of the religion promulgated by the Persian Prophet Zoroaster, and there can be no doubt that the performance of these ceremonies is an act of Divine Worship in its highest and truest sense.

The monies paid to the priests for the performance of the Muktad ceremonies forms a good portion of their ordinary income. The priests make a higher income during the Farvardigan days than they do during any other period of the year, and the Muktad ceremonies form a sort of endowment which goes a long way to maintain the priestly classes whose existence is necessary to the community of Zoroastrians.

According to the belief prevailing amongst the faithful followers of the Prophet Zoroaster, the performance of the Muktad ceremonies confers public benefits—benefits on the Zoroastrian community, on the peoples amongst whom they live and upon the country which they have chosen as their home. The fundamental principle underlying this belief is faith in the efficacy of prayers addressed to the Great Creator.

A Judge sitting on the original side is bound ordinarily to follow the judgment of another Judge when he has decided a point of law or laid down certain principles of practice or procedure or judicially construed any provision of the law prevailing in the country. But a single Judge is not bound to follow another Judge's findings of fact based on the evidence recorded by him when the evidence that may be available before a Judge in a later case may be fuller or more reliable and may tend to lead him to a different conclusion.

*Limpj Aseroji Baraji v. Dapuji Rutto ji Limbwalla*(1) not followed.

DINBAI, widow of Jehangir Cursetji Limbwalla otherwise known as Tarachand, a Parsee, on the 21st day of December 1871 made a settlement of certain moveable and immoveable properties belonging to her, and appointed her sons Cursetji Jehangir Tarachand and Merwanji Jehangir Tarachand and her son in law Sorabji Hormusji Bottlenwalla, all since deceased, the trustees thereof. The deed of settlement provided *inter alia* that the trustees and the survivors or survivor of them and the executors and administrators of such survivors should stand possessed of and interested in all the immoveable and moveable properties therein more particularly mentioned and thereby settled upon certain trusts, that is to say, "in trust to receive the interest and income thereof and to pay the same to Dinbai during her life, and after her death upon trust to purchase or set apart out of the

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SCOTT BAI

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SOONABAI

said trust funds promissory notes of the Government of India for the sum of Rs 15,000 bearing interest at 4 per cent per annum and to pay the annual income thereof to each of them the said Cursetji Jehangir Tarachand, Merwanji Jehangir Tarachand and Hormusji Sorabji Bottlewalla and after the death of any of them to his or their executors or administrators alternately in regular rotation every third year in the order named above to enable him or them to defray the expenses of annual Muktaf ceremonies of the dead members of the family in both sects of Shanshaya and Kadmi”.

The deed of settlement made provision for the payment of certain sums of money to the persons and for the purposes therein mentioned and then proceeded “and to pay and divide the net residue thereof unto and between the said Cursetji Jehangir Tarachand and Merwanji Jehangir Tarachand, their executors, administrators and assigns in equal shares”

Cursetji Jehangir Tarachand died on the 15th of December 1887 at Bombay leaving a will, dated the 17th January 1887 whereby he appointed his wife Bai Meherbai Cursetji Tarachand the sole executrix thereof. As this will was after the death of the testator lost or mislaid, the High Court of Bombay granted on the 15th March 1888 probate of the draft thereof to Bai Meherbai until the original will was produced

Bai Meherbai died at Bombay on the 16th February 1900 without fully administering the assets belonging to the estate of Cursetji Jehangir Tarachand. On the 3rd August 1900 letters of administration with the said draft will annexed of the unadministered property, property and credits of Cursetji Jehangir Tarachand were granted by the High Court at Bombay to the plaintiff as one of the sons and one of the two surviving residuary legatees named in the will of the said deceased limited until the original will was produced

The settlor Bai Dinbai died on the 5th March 1889. At the time of her death Sorabji Hormusji Bottlewalla and Merwanji Jehangir Tarachand were living and after her death they continued to manage the moveable and immoveable properties mentioned in the deed of settlement. In the course of such management they, in pursuance of the terms of the settlement,

set apart out of the trust-properties in their haads Government promissory notes of the value of Rs 15,000 for the purposes of the Muktdad ceremonies in the settlement directed to be performed

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CHAND

S. JOYADAR,

Bai Dinbai left a will dated 15th July 1886 whereby she appointed the said Cursetji Jehangir Tarachand, Merwanji Jehaagir Tarachand and Sorabji Hormusji Bottlewalla executors. As the said Cursetji had predeceased the executrix the will was proved by the surviving executors on the 18th May 1899. After the death of Bai Dinbai, the said Sorabji Hormusji Bottlewalla and Merwanji Jehangir Tarachand, as the surviving trustees of the settlement, went on paying the interest of the said Government promissory notes of Rs 15,000, alternately each year to (1) Bai Meherbai, the executrix of the will of Cursetji Jehangir Tarachand, until her death in the year 1900 and after that with the implied consent of the plaintiff as administrator to Bai Ratanbai, the eldest daughter of Cursetji Jehangir Tarachand, (2) to Sorabji Hormusji Bottlewalla until his death, which took place on the 31st August 1902, and after his death to his executors, and (3) to Merwanji Jehangir Tarachand until his death, which took place on 15th March 1905.

Since the death of Merwanji Jehangir Tarachand his executors, who held the said Government promissory notes, have not paid the income thereof to any one, as they entertained doubts as to the validity of the trust declared in respect of the said notes.

About the end of the year 1890 the whole of the estate of Bai Dinbai was administered and the whole trust properties under the deed of settlement were properly distributed, except the Government promissory notes which were set apart according to the deed of settlement. By an Indenture dated 16th April 1891, Merwanji Jehangir Tarachand, Meherbai, widow and executrix of Cursetji Jehangir Tarachand and the 3rd, 4th, 5th, 6th, 7th, 8th, 9th defendants hereto passed a release in favour of Merwanji Jehangir Tarachand and Sorabji Hormusji Bottlewalla, the executors and trustees abovenamed, with the proviso at the end thereof excluding the Government promissory notes of Rs 15,000 from the operation of the release, in the event of the trusts being found or declared to be imperitive or void.

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The 1st and 2nd defendants were the executrix and executor, respectively, of the last will and testament of Merwanji Jehangir Tarachand. The 3rd, 4th and 5th defendants were the daughters of Bai Mancekbai, the eldest daughter of the deceased settlor Bai Dinbai. Defendants 6, 7, 8, and 9 were the daughters of Bai Bachubai, the youngest daughter of Bai Dinbai. Defendants 10 and 11 were the surviving executors of the last will and testament of Sorabji Hormusji Bottlewalla. The 12th defendant was the Advocate General.

The plaintiff therefore filed this suit and obtained an original summons on the 18th April 1907 for the determination of the following questions —

(1) Whether the trusts declared in respect of Government promissory notes for Rs 15,000 mentioned in the plaint are valid?

(2) If the trusts abovenamed are valid, who are the persons entitled to get the interest on the said notes and to perform the Mukhtad ceremonies?

(3) If the trusts abovenamed are void, who are the persons entitled to the Government promissory notes for Rs 15,000 and the interest which has accrued and will accrue due thereon?

(4) Whether the agreement embodied in the release of the 16th December 1891 and referred to in paragraph 12 of the plaint is not binding on all the parties hereto?

(5) Whether in the event of the said trusts being held to be void the first and second defendants herein are not liable to account for the promissory notes of Rs 15,000 and the interest thereon?

*J. A. Tarachand* for the plaintiff

*Kanga*, for defendants 1 and 2

*Dahadurji*, for defendants 10 and 11

The summons was argued in chambers on 29th June 1907, when the learned Judge (Daval, J) adjourned it into Court for further evidence and argument and made the Advocate General a party.

*J. K. Tarachand*, for the plaintiff — Mukta ceremonies are ceremonies for the benefit of the dead. I refer the Court to the following cases —

*Lingji Nowroji Banaji v. Bapuji Ruttonji Lamburwalla*<sup>(1)</sup>, *Cowaji N. Pochkhanawalla v. R. D. Setia*<sup>(2)</sup>, *Dhumbaji v. Nawroji Bomanji*<sup>(3)</sup>, *Cowaji Byramji Gorewalla v. Perrotibai*<sup>(4)</sup>, *Maneckji Ldulji Allibless v. Sir Dinsha Maneckji Petit*<sup>(5)</sup>, *Dadina v. The Advocate General*<sup>(6)</sup>. These are all the cases, and they decide that trusts in favour of Mukta ceremonies are void all creating perpetuities.

See also *Dadji v. Advocate General*<sup>(7)</sup>.

I say that the trust is void on the basis of these cases as offending against the law of perpetuities.

[O'Farrell, J. — Show me that this rule applies to Parsis.]

We must refer to 43 Eliz., ch. 4, to see what bequests are charitable.

*Nawroji Beramji v. Rogers*<sup>(8)</sup> decides that the rule against perpetuities applies to Parsis.

[Davies, J. — In order to prove your case you must prove that the English law applies to Mukta. The Rule of Perpetuity is English Law, so far as succession goes it may apply to Parsis, but can you say that it applies to foreign religious institutions?]

The common law applies to India and there are certain exceptions with regard to Hindus and Mahomedans, but there is nothing to exempt the Parsis, see *Jeap Cheak Neo v. Ong Cheng Neo*<sup>(9)</sup>. This is enough to shift the onus on to the other side. If they allege any custom I shall be allowed to call evidence to contradict that custom.

*Kanga*, for defendants 1 and 2 — I represent the trustees, the executrix and executor of Merwanji Tarachand. There is no dispute as to the facts, the trustees are willing to carry out the

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C. TARA  
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SODHABAI

(1) (188) 11 Bom 411

(2) (190) 10 Bom 511

(3) (Unreported) Suit No 166 of 1880

(4) (Unreported) Suit No 281 of 1880

(5) (Unreported) Suit No 96 of 1892

(6) (Unreported) Suit No 49 of 1895

(7) (1904) 7 Bom L R 304

(8) (1867) 4 Bom H C R. (O C J) 1

(9) (1855) L R 6 P C 391



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trust and place themselves in the hands of the Court. The Parsi law has been in an undecided state since the decision of *Noorji Beramji v Rogers*<sup>(1)</sup>, which applies English law to Parsis. In Bombay Parsis are governed by the Charter, in the Mofussil they are governed by Bombay Regulation IV of 1827. There are four cases in which the English law has not been applied to Parsis. These cases are — *Dhanyibhai Bomanji v Navabhai*<sup>(2)</sup> where the law of advancement was held not applicable to Parsis, *Peshotam Hormasji Dasloor v Meherbai*<sup>(3)</sup> where infant marriage though not valid in English law was held by Scott, J, to be valid among Parsis, *Mithibai v Lingji Noorji Banaji*<sup>(4)</sup> where Bayley, J, held that the rule in *Shelly's* case does not apply to Parsis, and *Byramji Bhimji Bhai v Jamsetji Noorji Kapadia*<sup>(5)</sup>. It is rather difficult to say what is the law and by what law Parsis are governed. Jardine, J, is not supportable when we consider the literature of the community. The Transfer of Property Act makes the Law of Perpetuity applicable to Parsis but not to Hindus and Mahomedans. Section 17 of that Act saves perpetuities for the advancement of religion and charity. In England all religious trusts have been regarded as charitable. There Roman Catholic and other religious trusts were forbidden on some State exigency. Before the Reformation trusts for the souls of the dead were valid, but afterwards they were forbidden as being superstitious. see Statute 1 Ed VI, Ch 14. In England no religious trusts have been held void on the ground of perpetuity as being for superstitious purposes or for non charitable objects.

Jardine J, relies on *Cocks v Manners*<sup>(6)</sup>, but that case had nothing to do with religion. In the same case there is a bequest to certain sisters of charity and that was held valid. See *Colgan v Administrator-General of Madras*<sup>(7)</sup>. In England these gifts have been held valid not as religious but as gifts to certain voluntary association.

In *Yeap Oheak Neo v Ong Cheng Neo*<sup>(8)</sup> it will be seen that the Judge had the idea of superstitious uses in his mind.

(1) (187 ) 4 Bom H C R (O C J) 1

(2) (187 ) 2 Bom 75

(3) (1883) 13 Bom 60

(4) (1891) 5 Bom 5 G

(5) (1892) 16 Bom, 630

(6) (1871) L. R. 12 Fq 574

(7) (1892) 15 Mad 471

(8) (1875) I B C P C 381

Trusts for masses are valid in Ireland but not in England. There are decisions to say that Judges are not to decide that one religion is better than another, *Mokond Lal Singh v. Nobodip Ghunder Singha*<sup>(1)</sup>. In England trusts can be grouped under the following heads (1) Forbidden Religious Trusts; (2) Superstitious Religious Trusts, (3) Valid Religious Trusts, (4) Gifts to Voluntary Associations, (5) Trusts for erecting, repairing or maintaining monuments or tombs

(1) With Forbidden Religious Trusts we are not concerned, for the Proclamation of 1857 gives full liberty of religion

(2) The doctrine of superstitious uses does not apply to India. *Advocate-General v. Vishwanath Atmaram*<sup>(2)</sup>, 1 Cal VI, Ch XIV, only applied to trusts then created. Inter trusts are void because of the invalidity due to that Statute *Dominus Rex v. Lady Portington*<sup>(3)</sup> affords a clue as to what is meant by superstitious uses *Attorney-General v. Calvert*<sup>(4)</sup> shows that the spirit of that statute was carried on after the Reformation. I rely on four lines at p 260 On the question of masses the cases are very few, see *West v Shuttleworth*<sup>(5)</sup>, *In re Elliott*<sup>(6)</sup>, *The Attorney General v. The Fishmongers' Company*<sup>(7)</sup>, *In re Fleetwood*<sup>(8)</sup>, *Heath v Chapman*<sup>(9)</sup>, *In re Blundell's Trusts*<sup>(10)</sup> *West v Shuttleworth*<sup>(5)</sup> and *Heath v. Chapman*<sup>(9)</sup> are doubted by the Master of Rolls in *In re Michel's Trust*<sup>(11)</sup> and see Snell's Equity, 12th Edition, pages 124-125 *Das Merces v Cones*<sup>(12)</sup> is an authority showing that the doctrine of superstitious uses is not recognized in India This is followed in *Andrews v Joachim*<sup>(13)</sup> see also *Joseph Judah v. Aaron Judah*<sup>(14)</sup>, *Ahmedchand v. Mahadevgiri*<sup>(15)</sup>, *Rupa Jagaket v. Krishnaji Gorini*<sup>(16)</sup>

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(1) (1885) 25 Cal 881

(2) (1875) 1 Bom H. C App 15

(3) (1700) 1 Salkeld 162

(4) (1857) 3 Bea 218.

(5) (1835) 2 M &amp; H 681

(6) (1891) 33 W. R 297

(7) (1879) 2 Lca 151

(8) (1809) 15 Ch D 574.

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(9) (1851) 2 Drew 417.

(10) (1861) 30 Bea 30.

(11) (1860) 25 Bea 39

(12) (1861) 2 H J 65

(13) (1869) 2 Bea L. R. (O. C. J) 142

(14) (1870) 5 Bea. L. R. (O. C. J) 433

(15) (1875) 12 Bom H C R 214

(16) (1884) 2 Bom. 169

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(3) Valid Religious Trusts These are trusts of Protestants. The cases are *Baker v Sutton*<sup>(1)</sup>, *Townsend v Corns*<sup>(2)</sup>, *Parbati Bibee v Ram Barun Upadhyaya*<sup>(3)</sup>

Section 17 of the Transfer of Property Act and 43 Eliz, c IV, both say that bequests to religion are valid

A gift for the maintenance of religious ceremonies is a good gift *Turner v Ogden*<sup>(4)</sup>. A legacy towards establishing a Bishop in His Majesty's dominions in America was held good in *Attorney-General v The Bishop of Chester*<sup>(5)</sup>. In *Attorney-General v Lawes*<sup>(6)</sup> a direction to pay into a certain bank a yearly sum of £100 for the maintenance and support of the Irvingites was held valid. In *Thorn'ou v Howe*<sup>(7)</sup> a trust for printing and circulating religious works was held to be valid.

*Straus v Goldsmit*<sup>(8)</sup> is a case very like the present case. This decided that a bequest to enable persons professing the Jewish religion to observe its rites is good.

Trusts for all religions are valid charitable trusts provided they are not opposed to morality or positively harmful to the State. An instance of a trust held void as being contrary to the policy of the law is *De Thémmines v De Bonnetal*<sup>(9)</sup>.

(1) Gifts to Voluntary Associations in perpetuity are not valid, see *Cocks v Manners*<sup>(10)</sup> which is relied on in *Lingji Nowroji v Bapuji Ruttonji Limbuwalla*<sup>(11)</sup>. If the object of the association is private the trust is bad but where it is public it is good. *Carne v Long*<sup>(12)</sup> decided that a gift to a public library is not charitable. See the Encyclopædia of Laws, vol XI, p 314, under the head of 'Roman Catholic' where all these cases are collected. *Pease v Pattinson*<sup>(13)</sup> decided that trust for the relief of sufferers by a certain colliery accident is void. In *In re Sheraton's Trusts*<sup>(14)</sup> a bequest to the Sassoon Mechanic Institute was held void.

(1) (1836) 1 Ke n 224

(2) (1844) 3 Hare 207

(3) (1901) 31 Cal 895

(4) (1787) 1 Cox Eq C 316

(5) (1785) 1 Bro Cn Ca 444

(6) (1849) 8 Hare 8

(7) (1867) 31 Beav 14

(8) (1837) 8 S n 614

(9) (1803) 5 Russ 988

(10) (1871) 1 R 12 Eq 574

(11) (1887) 11 Bom 441

(12) (1860) 2 De G F & J 70

(13) (1880) 32 Ch D 151

(14) (1881) W N 174

*In re Clark's Trust*<sup>(1)</sup> decided that a bequest in aid of a society for raising funds for the benefit of persons in sickness was void

*The Attorney General v The Haberdasher's Company*<sup>(2)</sup> relied on by *Jardine J* in *Limbwalla's case*<sup>(3)</sup> is more a commercial case than a religious case.

( ) Gifts for erecting repairing and maintaining tombs are not valid see *Snell's Equity* p 113 (12th Edition). *In re Richard*<sup>(4)</sup> laid down that a bequest of money, the interest of which was to be applied in keeping up the tombs of the testator and his family, is void as a perpetuity *Hoare v Osborne*<sup>(5)</sup> decided a gift for the repair of a vault was void See *Shephard J*, in *Colgan v Administrator General of Madras*<sup>(6)</sup> *Fisk v. Attorney-General*<sup>(7)</sup>, *Fowler v Fowler*<sup>(8)</sup> *Dawson v. Small*<sup>(9)</sup>, *Tudor on Charities and Mortmain*, Ch V, section 4 p 131 (4th Edn) These bequests are held void because they do not advance religion

Indian legislation seems to include religious purposes in the word charity This is borne out by section 17 of the Transfer of Property Act In the Act VI of 1890 section 2, there is a definition of charity In *Wilson's Mahomedan Law* 2nd Edn, page 393, the distinction between religion and charity is explained We have to distinguish the three Indian cases *Colgan v Administrator-General of Madras*<sup>(6)</sup> is a decision on Masses and proceeds on the principle of *West v Shuttleworth*<sup>(10)</sup> and is therefore of very little use As to what is a mass, see *Attorney General v Delaney*<sup>(11)</sup> In *Colgan v Administrator General of Madras*<sup>(6)</sup> *Shephard J*, was of opinion that trusts for masses should be held valid but he followed *Lee p Cheah Neo v Ong Cheng Neo*<sup>(12)</sup> and held them void *Lee p Cheah Neo v Ong Cheng Neo*<sup>(12)</sup> can be distinguished The question is are these religious ceremonies pious uses or

(1) (1875) 1 Ch D 497

(2) (1834) 1 My & K 420

(3) (1887) 11 Bom. 441

(4) (186) 31 B & C 11

(5) (1866) L R 1 Eq 563

(6) (1897) 12 M & L 4 & 2 P 330

(7) (1867) L R 4 Eq 501

(8) (1861) 33 Bear 616

(9) (1884) L R 13 Eq 114

(10) (1830) 2 V & L 601

(11) (1855) 1 R. 10 C L 101 at p. 107

(12) (1875) L R 6 P C 351

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religious uses? In *Limbwalla's* case<sup>(1)</sup> they are held to be pious uses.

*Bahadurji* for defendants 10 and 11, the surviving executors of Sorabji H. Bottlewalla, one of the three trustees of the original deed of settlement —The suggestion in *Limji Nowroji Banaji v. Bapuji Ruttonji Limbwalla*<sup>(2)</sup> that Parsis are governed by English law has no authority for its support. All the Judges who decided cases about Baj Rojgar trusts have worked from the Christian point of view and they could not dissociate themselves from the view of the pious ceremonies of the Christian Church. Toleration of religion is the basis of the English Rule here (1780) 21 George III, ch. 70, sections 17 and 18, said that Courts in India should have regard to the religious usages and customs of the natives of India.

37 George III, ch. 142, section 12, is very similar. 4 George IV, c. 71, High Court Rules, page 13. The policy from the earliest time seems to be to grant entire freedom in respect of religion to the natives of India. Westropp, J., in *Naoroji Beramji v. Rogers*<sup>(3)</sup> says that the Parsis are governed by English law. I submit that law contemplates equality and freedom of religion see Letters Patent, High Court Rules, page 67, cl. 19. Bombay Regulation IV of 1827, section 26, relates to the mofussil. According to these statutes the Parsis in the mofussil are governed by the law of India as to usage and custom but not the Parsis in Bombay who are governed by the English law, and he has only to step out of the jurisdiction of this Court to establish such a trust as is now in dispute as valid. If a trust does not come within the spirit of 43 Eliz, c. 4, it can be upheld as valid within the jurisdiction of this Court. I propose to cite a series of cases to show that the High Court here has not followed consistently the principle laid down in *Limji Nowroji Banaji v. Bapuji Ruttonji Limbwalla*<sup>(4)</sup>. Prior cases are the following—*Ardateer Carseltje v. Perozeboye*<sup>(5)</sup> decided that so far as the ecclesiastical side of the Court was concerned the English law did not apply to Parsis. *Homabae v. Punjabhac*

(1) (1887) 11 Bom 441.

(2) (1887) 4 Bom H. C R. (O.C. J.) 1.

(3) (1856) 6 Moo I A 318.

*Dosabkate*<sup>(1)</sup>, *Modae Kailkhooscrow Hormuzjee v Cooverbhaxe*<sup>(2)</sup> laid down that there is the restraint upon the testamentary power of disposition by a Parsee, page 153 of Sorabjee Bengali's book on Parsee Acts. In *Mithibai v Limji Nowroji Banaji*<sup>(3)</sup> a reference is made to *Gheeta's* case where an illegitimate son was held entitled to succeed to his father's share following the Hindu principle. *Mihirwanjee Nuoshirwanjee v Awan Bacc*<sup>(4)</sup> referred to in *Arabi v Jamaji Jamshedji*<sup>(5)</sup>.

There is another case *Mancharsha Ashpandary v Kamrunisa Begam*<sup>(6)</sup> which decided that English law did not apply in its entirety to Parsis, and see Bayley, J's judgment in *Jivandas Keshavji v Framji Nanabhai*<sup>(7)</sup>. *Bar Maneckbai v Bar Merbai*<sup>(8)</sup> decided that section 7 of the Statute of Frauds applies to Parsis. Fulton, J, in *Navroji Manockji Wadia v. Perozbai*<sup>(9)</sup> and in *Shapurji v. Dossabhey*<sup>(10)</sup> Batchelor, J, said that the law governing the Parsis in the mofussil is the customary law of the Parsis modified by justice, equity and good conscience.

So far therefore as religion is concerned there is no established Church in India as there is in England and we have here perfect freedom of religion. I mean by "established Church" the Church is established and maintained by the State. The doctrines of the Established Church of England are always the considerations entered into whenever there is a contest on religious matters, but here there is no particular church maintained by the State. See Ilbert's Government of India pp 256—259, 53 Geo III, clause 155, section 33, 3 and 4 Will IV, ch. 85, sections 92—102 and see also West, J's observation in *Falmahib v The Advocate-General of Bombay*<sup>(11)</sup>.

As to the cases decided in the Bombay High Court the decree in the case of *Limji Nowroji Banaji v Bapuji Ruttonji Limbwalla*<sup>(12)</sup> was practically a consent decree (Read at p 417) The

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(1) (1835) 5 Sath W. R., p. a. 102

(2) (1856) 6 Moo 1 A 41<sup>a</sup>

(3) (1881) 5 Bom 806

(4) (1892) 2 B R Bom Rep 231

(5) (1860) 3 Bom H C R. (A. C. J.) 113.

(6) (1863) 5 Bom H C R (A. C. J.) 103

(7) (1870) 7 Bom. H C R. (O. C. J.) 45.

(8) (1891) 6 Bom. 37<sup>a</sup>.

(9) (1895) 23 Bom 80 at p. 87.

(10) (1905) 50 Bom. 307 at p. 36<sup>a</sup>

(11) (1931) 6 Bom 42 at p. 50

(12) (1887) 11 Bom 411

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evidence I shall produce will show that the ceremonies are for the public benefit of all Zoroastrians. Benefit is derived by the whole community. If evidence had been given before Jardine, J., he would have been of the opinion that the bequests were not for the benefit of individuals or of families but of the whole community. In *Wadia's case*<sup>(1)</sup> there was no contest, it was a friendly suit. *Gorewalla's Case*<sup>(2)</sup>, *Wadia's Case*<sup>(3)</sup>, *Moodwalla's Case*<sup>(4)</sup>, *Alibless' Case*<sup>(5)</sup>, *Marker's Case*<sup>(6)</sup>, all followed *Limbwalla's Case*<sup>(6)</sup>. I refer to the Irish cases for the performance of Masses.

[DAVAR J. — I should like to know any case where English law applies to Parsis in respect of religion.]

- The Statute of Mortmain does not apply to India, therefore if any question on religion arises it should be judged from the standpoint of the English law prior to the Reformation. See Tudor on Charities and Mortmain, 4th edition, p. 1, 23 Henry VIII Ch. 10, 1 Edward VI Ch. 14 § 9 and 10 Viet Ch. 5, 23 and 24 Viet Ch. 134, section 1. Theobald on Wills, 6th edition, pp. 350—353. Gifts to perform Masses would be void as being superstitious. See Tudor, p. 8 § 9 and 10, Viet Ch. 59, referred to Jews, 1 Will and Mary Chapter 18 referred to Roman Catholics and Dissenters, 2 and 3 Will IV, Ch. 110 and 23—24 Viet Ch. 134 section 1 referred to Roman Catholics. A bequest to a Jew to observe the rites of that religion was held valid in *Straus v Goldsmid*<sup>(7)</sup>. This was before 9 and 10 Viet 159. *In re Michel's Trust*<sup>(8)</sup>. If the Parsis are not governed by English law then the rule against perpetuities does not apply so far as religious trusts are concerned. Once the religious liberty is granted then the rule against perpetuities has no application even if such religious trusts are not for the public benefit. If these trusts are for the public benefit then it matters little by what law we are governed, but even if they are not for the public benefit, then as the rule against perpetuities does not

(1) Suit No. 563 of 1899

(2) Suit No. 281 of 1897

(3) Suit No. 267 of 1890

(4) Suit No. 96 of 1897

(5) Suit No. 49 of 1895

(6) (1887) 11 Bom. 41

(7) (1837) 3 S. M. 614

(8) (1860) 23 Beav. 39

apply the trusts are valid Hindus and Mahomedans can make private religious trusts which are valid *Mullick v. Mullick*<sup>(1)</sup>, *Juggu' Mohini Dossee v. Mussumat Sokheemoney Dossee*<sup>(2)</sup>, *Talmabli v. The Advocate General of Bombay*<sup>(3)</sup>, *Kumara Asima Krishna Deb v. Kumara Kumira Krishna Deb*<sup>(4)</sup>

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If I establish that the performance of Muktaḍ ceremonies amounts to an act of divine worship, then although if it is a perpetuity the trust would be good I wish to establish five propositions (1) The doctrines of the Zoroastrian religion enjoin the performance of Muktaḍ ceremonies (2) The performance of these Muktaḍ ceremonies amounts to the performance of an act of religious or divine worship (3) According to the doctrines of the Zoroastrian religion the performance of Muktaḍ ceremonies results in public benefit, either temporal or spiritual, and that it is believed to bring divine blessings not only on the party performing these ceremonies or his household but upon the whole community and on the world at large. (4) Muktaḍ ceremonies, or at all events the essential parts of such ceremonies, can only be performed by priests (5) Payments received by the priests for the performance of such ceremonies form a portion of their ordinary income and means of livelihood

A devise to charitable and pious uses generally was held good in *Attorney General v. Herrick*<sup>(5)</sup>. In *Powerscourt v. Powerscourt*<sup>(6)</sup> a devise to trustees to lay out at their discretion 2,000£ "in the service of my Lord and Master" was upheld *Townsend v. Carns*<sup>(7)</sup> decided that a bequest for spiritual purposes was good. *Farquhar v. Darling*<sup>(8)</sup> upheld a devise "to the poor and the service of God" In *Turner v. Ogden*<sup>(9)</sup> it was held that a bequest for preaching a sermon on Ascension Day, for keeping the chimes of the Church in repair, and for a payment to be made to the singers in the gallery of the Church are all bequests to charitable uses within 13 E 12

(1) (1870) 1 K. &amp; J. 15

(2) (1871) 14 Moo. I. &amp; 259

(3) (1881) 6 Bom. 10

(4) (1888) 2 Bom. L. 1 (O. C. J.) 11 at p. 17

(5) (1772) 2 Amb. 719

(6) (1877) 1 Moller 616.

(7) (1844) 3 Hare 2.

(8) [1896] 1 Ch. 51.

(9) (1777) 1 Cor. Ch. Cas. 316.



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In *The Commissioners for Special purposes of Income Tax v. Pemsel*<sup>(1)</sup> Lord Macnaghten discussed the meaning of the word charity. Story's Equity, 2nd edition, page 790, section 1155

Payments made to clergy for the performance of religious services have been held to be good gifts as tending to the advancement of religion *Robb and Reid v. Dorrian*<sup>(2)</sup>, *Thorner v. Wilson*<sup>(3)</sup>.

Trusts for the performance of Muktad ceremonies stand on the same footing as gifts for Masses for two reasons —(1) All religions in India are on the same footing *Das Mercers v. Cones*<sup>(4)</sup> This case was followed in *Andrews v. Jacalm*<sup>(5)</sup> which decided that a bequest in a will of a sum of money for the performances of Masses in Calcutta was valid *O'Hanlon v. Logue*<sup>(6)</sup> overruling *Attorney-General v. Delaney*<sup>(7)</sup> decided that a bequest for masses in perpetuity is a good charitable gift, whether there is a direction that the Masses should be celebrated in public or not. (ii) There is no application of the doctrine of superstitious uses in India just as there is no such application in Ireland *Advocate-General v. Vishvanath*<sup>(8)</sup>, Tudor on Charities and Mortmain 4th edition, page 791, *Attorney-General v. Hall*<sup>(9)</sup>

Prior to the Reformation of 1823 bequests to perform Masses were held valid in England and Ireland, but since 1823 private and public masses were distinguished and bequests for private masses were held to be void *The Commissioners of Charitable Donations and Bequests v. Walsh*<sup>(10)</sup> decided that trusts for Masses held in public or private were valid trusts *Attorney-General v. Delaney*<sup>(7)</sup> decided that Masses in public were valid on the ground that they tended to the edification of the congregation but trusts for Masses held in private are void

*Padsha* —This was overruled thirty-one years after by the same Judge in *O'Hanlon v. Logue*<sup>(6)</sup>.

(1) [1891] 1 C 531 at p 583

(2) (1877) 1 R 11 C L 292 at p 297

(3) (1855) 3 Dru v 245

(4) (1861) 2 HJde 65 at p 71

(5) (1860) 2 Ben L R (O C J) 148

(6) [1906] 1 I R 247

(7) (1872) 1 R 10 C L 104

(8) (1855) 1 Lom 11 C App 12

(9) [1897] 2 L R 426 at p 447

(10) [1810] 1r 7 Eq 31 (note)

The performance of Masses amounts to an act of divine worship which is believed by those belonging to the faith to bring benefits and blessings, spiritual or temporal, to the public at large within the spirit of 43 Eliz. See Palles C B's judgment in *O Hanlon v. Logue*<sup>(1)</sup> at pages 274-276 and FitzGibbon L J's judgment at page 280 and Holmes L J at page 286.

The test is the belief of the testator or settler as to the spiritual or other benefits. This Muktd ceremony is an act of religious worship which amounts to an act of praise, adoration and thanksgiving involving a petition for benefits both temporal and spiritual on all Zoroastrians and all good people belonging to all other communities, including always a prayer for the ruling Sovereign of the country and for good government by him.

*Webb v. Oldfield*<sup>(2)</sup> decided that a bequest of perpetual rents of property to two Vegetarian Societies was good. FitzGibbon, L J., there says that the essential attributes of a legal charity are that it should be unselfish, public benevolent or philanthropic. *Cross v. London Anti vivisection Society*<sup>(3)</sup> decided that societies for the suppression and abolition of vivisection are charities. *Teap Cheah Neo v. Oig Cheng Neo*<sup>(4)</sup> turns upon *West v. Shuttleworth*<sup>(5)</sup>, it referred to Penang where there was no native population when the British settled there. In India there was a population whose customs and usages had to be taken into consideration. In *West v. Shuttleworth*<sup>(6)</sup> no evidence of custom was taken, it was decided not on facts but on the English Statutes. See also *Cary v. Abbot*<sup>(7)</sup>.

In *Colgan v. Administrator-General of Madras*<sup>(8)</sup> though the Judges say that the law of superstitious uses does not apply to England still they follow *West v. Shuttleworth*<sup>(9)</sup>.

As to the ceremonies which are performed during the Muktd days they amount to an act of divine and religious worship and result in benefits to the community and also to the world at large, and I cite passages from the Zoroastrian Scriptures to prove

(1) [1906] 1 I. R. 217

(2) [1905] 1 I. L. 431

(3) [1905] 1 Ch. 61

(4) [1905] L. R. 61 C. 351

(5) [1905] 2 V. & K. 681

(6) [1907] 7 V. & K. 100

(7) [1907] 1 Ch. 101

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that Muktaḍ ceremonies are enjoined in the Farvardin Yast which is dedicated to all Furohurs. As to Furohurs see Sacred Books of the East Vol 23, page 179 Farvashis are the same as Furohurs. There is a distinction between Fravashi and Ravan Haugh's Essay on Parsis, 3rd Edition, page 206. (Civilization of the Eastern Iranians in ancient times by Geiger, Vol 2, page 113, Zarathustra and Zoroastrianism by Rustomji Edulji Dastur Peshotam Sanjana, page 242) The ceremonies enjoined during the Muktaḍ days are based on paragraphs 49-52 of the Farvardin Yast, see Sacred Books of the East, Vol 23, page 192 These are the only references as far as Avesta literature is concerned but there are other references in Pehlvi Dinkard, Vol 37, Sacred Books of East page 17. There are further references in Bahman Yast (Vol 5 of Sacred Books of the East page 208) That refers to the 11th century A. D. (See also Shayast La Shayast (what is worthy and what is not worthy to be done), Vol 5 of Sacred Books of the East, page 351, paragraph 31, Sad Dar Book, Vol 24 of Sacred Books of the East, page 264, written in the 16th century Patet Pashemani Spiegels Avesta, page 157, paragraph 18)

The next question is what are the usual and essential ceremonies performed on these Muktaḍ days?

According to some people five ceremonies are essential, according to others these are four (i) Afringan (ii) Baj, (iii) Satum, (iv) Farokshi, (v) Yezeshno.

(i) Afringan consists of prayers expressing nothing but praise, adoration and love for the Almighty and the Furohurs It is divided into three parts (a) Afringan Dibache, the introduction and the most important part because it contains universal prayer and is universally said, (b) Afringan proper, (c) Afrin or benediction Of Afringan proper there are in all eleven kinds Afringan Ardafarvash, Afringan Dahaman, Afringan Surosh, are performed during the Muktaḍ days Afringan Dahaman is taken from the sixtieth chapter of Yasna

(ii) Baj ceremonies consist of recitals of chapters 3-8 of Yasna in Vol 31 of the Sacred Books of the East, pages 207-230 Verses 5, 6, 8, chapter VIII, page 229, are very important.

(iii) Satum : c, praise, see Yasna, chapter XXVI, page 278, clauses 1, 2, 5. Mr Kanga's *Khordah Avesta* pages 382—391.

(iv) Furrokshi ceremony begins with Satum and the whole of the Farvardin Yast follows. Sacred Books of the East, Vol. 23, pages 179—230. Furrokshi is a ceremony for all the Furohurs. Farvardin Yast is a portion of it and a Yast which is dedicated to all Farohars.

(v) Yezeshne is said to be the highest and most solemn of all the ceremonies performed during the Muktd days and consists of the whole of the Yasna of 72 chapters which includes 17 chapters of Gathas, chapters 3—8 of the Baj, chapter 60 of Afringan, and lastly part of the Satum. see Vol. 31 of Sacred Books of the East, page 195. Yasna and Yezeshne are the same.

As to the application of English law to Parsis I omitted to cite a case important as showing what the Privy Council said. *Rani Bhagwan Kuar v. Yogendra Chandra Bose*<sup>(1)</sup>

*Padsha* for the Advocate General.—Trusts for the performance of Muktd ceremonies are not void because of the prohibition on the ground of superstitious uses. As to what are superstitious uses see Bacon's *Abridgment* Vol 1, page 581 (5th edn), Chapter on Mortmain and Superstitious Uses. Muktd ceremonies have nothing to do with the souls of the dead but with their Furohurs and the Furohurs of the dead. The doctrine of superstitious uses relates only to the souls of the dead and would not apply to Muktd ceremonies even though it were in force in India. Superstitious use is defined in Tudor (edition of 1906) page 4. All religions not subversive to morality are tolerated in India. Dr Whitley Stokes Vol 1, page 330, note to section 105 of Succession Act says that there is no prohibition in India of what English lawyers call superstitious uses. And at page 330 note b, he says 'In India a trust for what English lawyers call superstitious uses, e.g., saying Masses for the dead, may be valid.' *Das Mercedes v. Cones*<sup>(2)</sup>, *Andrers v. Joikiri*<sup>(3)</sup>. Advocate-General v. *Fiskiana*<sup>(4)</sup>,

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(1) (1903) L R 30 I A 249 at pp 253—254. (2) (1839) 2 Bn L R (O C J) 143

(3) (1861) 2 H J de C

(4) (1853) 1 Bn H C Appellate p. 17.

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*Colgan v. Administrator-General of Madras*<sup>(1)</sup>, followed in *Kaloolala Sahib v. Nuseerudeen Sahib*<sup>(2)</sup>, all these cases show that the doctrine of superstitious uses does not apply to India, and if trusts for Masses have not been held valid it is not because of superstitious uses but on the ground of perpetuity. Though it might possibly be held that the English Civil law applied to Parsis as in *Naoroji v. Rogers*<sup>(3)</sup>, yet the religious law of England since the Reformation has not been held to apply to India. It was held in *Mitford v. Reynolds*<sup>(4)</sup> and in *Mayor of Lyons v. East India Company*<sup>(5)</sup> that the statutes of Mortmain have not been extended to India. These were followed in *Yeap Cheah Neo v. Ong Cheng Neo*<sup>(6)</sup>. Superstitious uses were created by the Reformation; see Tudor, page 4. Jarman on Wills, Vol. 1, page 163 (5th edn.), 23 Henry VIII, Ch. 10, 1 Edward VI, Ch. 14, *Reg. v. Commissioners of Income Tax*<sup>(7)</sup>. The English Judges followed those statutes and extended their policy. Trusts to say Masses were held to be good religious trusts before the Reformation: see the arguments of Browne, K. C., in *O'Hanlon v. Logue*<sup>(8)</sup> at pages 248—254 and Coke on Lyttleton, Vol. I, sec. 169 (19th edn.). The rule of perpetuity was in vogue at the time also but still such trusts were held valid. I argue therefore that even if we are governed by the common law of England and apply the same to our religious trusts and even if it is held that our Mukhad ceremonies resemble Masses still such trusts according to the common law prevailing in England prior to the Reformation would be held valid.

*In re Michel's Trust*<sup>(9)</sup> shows that the English law though it relaxed its severity in other matter still it retained its severity with regard to trusts to say Masses for the repose of the dead.

The question then is what Religious Law would apply to India. *Naoroji v. Rogers*<sup>(3)</sup> lays down that only as to civil rights English law would apply; as to religious trusts whether it is or

(1) (1892) 15 M.S.L. 424.

(2) (1894) 18 M.S.L. 201.

(3) (1897) 4 Bom. H. C. R. (O. C. J.) 1.

(4) (1841) 1 Phil. 185.

(5) (1836) 1 Moo. L. A. 175.

(6) (1875) L. R. 6 P. C. 381.

(7) (1888) 22 Q. B. D. 200 at p. 310.

(8) [1906] 1 I. R. 247.

(9) (1860) 28 Deav. 50.

is not good must be decided by a secular judge upon the evidence of witnesses professing the same faith as the settlor or testator. In *Yeap Cheah Neo v Ong Cheng Neo*<sup>(1)</sup> English law was applied because no evidence as to the customary law of the Chinese was taken. This case was referred to by West, J., in *Jatmabibi v The Advocate General of Bombay*<sup>(2)</sup>. In *O Hanlon v Logue*<sup>(3)</sup> FitzGibbon, J., says the secular Court must act upon evidence of the belief of the members of the Community concerned. In India all religions stand on an equality except that Episcopal and Presbyterian Churches have some benefits from the Indian Revenue. 53 Geo III, Chapter 155, section 38, Herberts Government of India, pages 256—259, *Advocate General v Vishwanath*<sup>(4)</sup>. The *Lex Loca* applies where the country acquired is inhabited until the Crown or Legislature changes it.

The next point is to show that a religious trust is a charitable trust. In *Baker v Sutton*<sup>(5)</sup> Lord Langdale M R says "all the cases with one exception go to support the proposition that a religious purpose is a charitable purpose". This was followed in *Townsend v Carus*<sup>(6)</sup>, a very important case and the judgment of the Vice Chancellor is very instructive. In that case a bequest to trustees to pay monies to certain societies having regard to the glory of God in the spiritual welfare of his creatures, was held a good religious purpose. *Powerscourt v Powerscourt*<sup>(7)</sup> cited in *In re Darling*<sup>(8)</sup> where a gift by will "to the poor and to the service of God" was upheld as a good charitable gift. *Attorney-General v Pearson*<sup>(9)</sup>, *Commissioners for special purposes of Income Tax v Pemsey*<sup>(10)</sup>.

Muktad ceremonies are acts of religious and divine worship and they also form an important source of remuneration to the priestly class, in other words, they are for the benefit of the Ministers of the Parsi religion. Such a benefit is clearly within the definitions of religious or charitable uses in section 105 of the Indian Succession Act. *Magistrates of Dundee v Presbytery*

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(1) (1875) L 1 G P C 381 at p 395.

(2) (1881) 6 Bom 42 at p 50.

(3) [1906] 11 F R 117 at p 19.

(4) (1895) 1 Bom H C Appx, ix.

(5) 1836] 1 Hec 21 at p 239.

(6) (1843) 3 Hare 207.

(7) (1891) 1 Melloy 616.

(8) [1894] 1 Ch 50.

(9) (1817) 3 Mer 3, 3.

(10) [1891] 4 C 531.

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of Dundee<sup>(1)</sup> upheld a gift for the benefit of the ministers of the presbyterian religions of a particular town. In *Griener v Case*<sup>(2)</sup> a gift for the maintenance of preaching ministers was held good. *Middleton v Clitherow*<sup>(3)</sup>, *Gibson v. Representative Church Body*<sup>(4)</sup>, Tudor, page 54

There are two points of resemblances between Muktdad and Masses, both are addressed to a large congregation and parts of the ceremony of both can only be performed by priests. The Parsi religion stands on the same footing as the Roman Catholic religion does in Ireland. Therefore the Irish cases are important. I rely on the evidence of the high priests.

*J. K. Tarachand* for the plaintiff in reply.—The Zoroastrian religion is the religion revealed by God to Zoroaster and then promulgated by him. Interpretations by priests or interested person are not part of the Zoroastrian religion. The Gathas do not say anything about Farvashis. Muktdad ceremonies are not religious ceremonies but ceremonies sanctioned by custom which arose after the Farvardin Yast was written which was long after the religion had been revealed to Zoroaster. What is custom is not religion. Section 50 of Farvardin Yast asks for prayers on the Furohurs themselves and not on God or anyone else. (Sacred Books of the East, Vol 23, page 56, sections 8—11, Vol III of Khordah Avesta, section 21.) The Muktdad ceremonies are not, and were never intended to be, for the benefit of the souls of the dead. This is an erroneous belief and engendered in the minds of the ignorant Parsis by priests for the purpose of putting money into their own pockets. The evidence in *Lambwalla's case*<sup>(5)</sup> shows clearly the difference between Furohurs and the souls of the dead (see Jardine, J's judgment at page 446). I submit Jardine, J, was right and that he had the proper evidence before him.

In *Allibless' case*<sup>(6)</sup> the Advocate General did not object to the matter being reopened. The question is does the English law apply to a perpetual trust for the performance of Muktdad cere-

(1) (1861) 4 Macq 298

(2) (1792) 4 Bro Ch Cas 67.

(3) (1793) 3 Vesey 734

(4) (1881) 9 L R Ir 1

(5) (1897) 11 Bom 441

(6) (Unreported) Su t No. 96 of 189.

monies *Maclean v Cristall*<sup>(1)</sup> gives a history of how English law was introduced into India. The Court must decide whether, and what part of, the law applies to this case. The element of public benefit is wanting although it may be a religious trust although it may be necessary to employ a priest to perform the ceremonies, although it might amount to an act of divine worship, still the trust would be bad in law as offending against the rule of perpetuity. Transfer of Property Act, sections 14—17. There must be present the element of public benefit. If a trust is for the advancement of religion it would be for the public benefit, but every religious trust is not for the public benefit. Queen's Proclamation, Ilbert's Government of India, page 572, *Commissioners for special purposes of Income Tax v Pemsel*<sup>(2)</sup>, *Dolan v Macdermot*<sup>(3)</sup>, *Jeffries v Alexander*<sup>(4)</sup>, *Morice v The Bishop of Durham*<sup>(5)</sup>, *Attorney General v Delaney*<sup>(6)</sup>, *O Hanlon v. Logue*<sup>(7)</sup>, Tudor on Charities page 37, *Yeap Cheah Neo v. Ong Cheng Neo*<sup>(8)</sup>. In *Thornton v Howe*<sup>(9)</sup>, *In re Michels' Trust*<sup>(10)</sup>, *Straus v Goldsmid*<sup>(11)</sup> and *Turner v Ogden*<sup>(12)</sup>, the trusts were for the public benefit. The statute of superstitious uses merely made these existing trusts void and afterwards the Courts would not uphold the trusts of the same nature. The doctrine of superstitious uses made trusts illegal but did not make them non-charitable. If the trusts are illegal but charitable the doctrine of Cyprès would apply. I submit that the Court is bound by the decision in *Yeap Cheah Neo v Ong Cheng Neo*<sup>(8)</sup>. *O Hanlon v Logue*<sup>(7)</sup> was not a decision of the highest Court of appeal nor were the Judges who decided it unanimous.

I further submit that the trust is impossible of performance because certain objects are unascertainable, therefore the trust is void for uncertainty both as to the ceremonies to be performed and the time at which they are to be performed. The Parsis

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(1) (1879) 1 P. O. C. 241 S.

(2) [1891] A. C. 521

(3) (1865) 1 L. R. 5 F. 60

(4) (1860) 5 H. L. C. 504 at p. 612

(5) (1891) 9 V. &amp; G. 377 at p. 406 and

(1905) 10 V. &amp; G. 521 at p. 512.

(6) (1879) 1 Cox. Cl. C. 316.

(7) (1879) 1 P. O. C. 104

(8) [1905] 1 L. R. 17

(9) (1879) 1 L. R. 6 P. C. 21

(10) (1879) 31 Beav. 14

(11) (1879) 9 L. R. 30

(12) (1879) 8 L. R. 614



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have lost their Calender, according to some, the new year commences in September, others say it commences in August, and others again say it begins on the 21st March. The commencement of the year being unascertainable the last ten days of the year cannot be ascertained. The Farvardin Yast directs that these ceremonies be performed at the end of the Parsi year.

I further say this trust is void as being opposed to public policy. See Sir Charles Farnham's notes. The Legislature was approached to make such trusts valid and after due consideration came to the conclusion that these trusts are void by not passing any legislation to disturb the judgments. The Court should therefore uphold these decisions.

DAVAR J.—Dinbai widow of Jehangir Cursetji Lakimna, otherwise known as Tarachund a member of the Parsi community of Bombay, on the 21st of December 1871 executed an Indenture of Trust whereby she appointed her two sons Kharsetji and Merwanji and her son-in-law Sorabji Hormusji Bottlewalla Trustees and conveyed to them certain immovable and moveable property belonging to herself upon Trusts which are therein set out. All the three original Trustees are dead. The first defendant is the widow, and executrix of the will, of Merwanji one of the original Trustees. The plaintiff is the son and administrator with the will annexed of the property and credits of his late father Kharsetji who was another original Trustee. Defendants Nos 10 and 11 are the surviving executors of the will of Sorabji Hormusji Bottlewalla the third Trustee under the Settlement made by Dinbai.

The portion of the Trusts created by Dinbai with which the Court is concerned in this case is in the following terms—

In trust to receive the interest and income thereof and to pay to the said Bai Dinbai during her life time and after her death upon trust to purchase or set apart out of the said Trust Funds Promissory Notes of the Government of India for the sum of Rs. Fifteen Thousand bearing interest at the rate of four per centum per annum and to pay the annual income thereof to each of them the said Kharsetji Jehangir Tarachund Sorabji Hormusji Bottlewalla and Merwanji Jehangir Tarachund and after the death of any of them to his or their Executors or Administrators alternately in regular rotation every third year in the order named above

to enable him or them to defray the expenses of annual Mukhtad ceremonies of the dead members of the family in both sects of Shenshal and Cudmees

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Dinbai died on the 6th of March 1889 Previous to her death she executed a will bearing date the 15th of July 1886 By the said will she directed that certain silver utensils which were in her possession and which are used in the performance of the Mukhtad ceremonies should be kept in trust by her executors and each of the Trustees of the Settlement of 1871 were to be allowed to use the same for the purposes of the Mukhtad ceremonies The Executors of the will were the same as the Trustees under the Trust Settlement of 1871 Kharsetji predeceased Dinbai Sorabji died on the 31st of August 1902 The third Trustee Morwanji died on the 15th of March 1905 After Dinbai's death the Trusts in respect of the Mukhtad ceremonies were carried out up till the death of Morwanji in 1905 The first defendant is in possession of the Government Paper of the nominal value of Rs 15000 mentioned in the Trust deed of 1871 and the silver utensils mentioned in the will of Dinbai The Mukhtad ceremonies were admittedly not performed in the year 1906 The plaintiff filed the suit and obtained an originating summons for the purpose of having certain questions arising under the Trust Deed settled by the Court The first of these questions is —

“Whether the Trusts declared in respect of the Government Promissory notes for Rs 15,000 mentioned in the plaint are valid”

This originating summons first came on for hearing before me in Chambers on the 22nd of June when counsel for the parties appearing at the hearing took it for granted that I would follow the decision of Mr Justice Jardine in *Lumsy Newroys v Bapuji Rattons*<sup>(1)</sup> declaring Trusts for Baj Rojgar and Mukhtad ceremonies to be invalid In recent years I had, however, occasions to consider that case commonly spoken of as *Limbwalla's case* and I entertained grave doubts as to the correctness of the application of the rule against perpetuities to trust relating to Mukhtad and Baj Rojgar ceremonies prevailing amongst the Parsis

(1) (1857) 11 Bom. 441

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professing the Zoroastrian religion I had weighty reasons for declining to follow that decision and desiring to judge for myself whether the doubts I entertained were well founded. At this hearing the only question that I was asked to consider was raised by Mr. Kanga for the 1st and 2nd defendants who contended that the plaintiff's claim was barred by limitation. This contention was based on the decision of Mr Justice Candy in *Corways N Pochlhanwalla v R D Se'na*<sup>(1)</sup> and on the assumption that the Trust in question in this suit was bad in law. On my expressing my unwillingness to follow the previous decision referred to above Mr Bahadurji who appeared for defendants 10 and 11 was instructed immediately to say that he would be prepared to support the Trust. The matter was after some argument adjourned to the following contested Chamber day and came on again for further hearing on the 29th of June when I adjourned the summons into Court for evidence and argument and directed that the Advocate General be added as a party defendant. At the hearing in Court Mr Kunga for defendants 1 and 2, Mr Bahadurji for defendants 10 and 11 and Mr Padsha for the 12th defendant, the Advocate-General combined forces and waged uncompromising war in favour of the Trust against the plaintiff whose counsel Mr Turachand bore the brunt of the attack with remarkable courage and attempted with much ability to uphold his contention that the Trust created by Dinbai for the performance of Muktd ceremonies was not a Charitable Trust and was bad in law as offending against the Rule forbidding perpetuity.

It is not easy to learn or understand the true meaning and import of the ceremonies involved in the comprehensive word Muktd or Dosln. Though a Parsi myself it took me considerable time before I could correctly understand the real meaning and nature of the ceremonies—their origin and effect—and the true aim and object of the performance of those ceremonies during the Muktd days. As the case progressed before me I realised how much patient labour must have been involved on the part of counsel for all parties before they were able to place the

(1) [1899] 20 Bom 511

case before me in the manner in which it was placed before the Court and not a little credit is due to the solicitors who worked and laboured to instruct them so efficiently.

Before I proceed to consider the main point in the case it is necessary that I should deal with the contention of Mr Tarachund forcibly pressed upon me by him that I was bound to follow the decision of Mr Justice Jardine more especially as other Judges had followed the same in other cases

Sitting on the Original Side of this Court I concede at once that I am bound ordinarily to follow the judgment of another Judge when he has decided a question of law—or laid down certain principles of practice or procedure—or judicially construed any provision of the law prevailing in the country. But surely there the matter must end. Is a single Judge bound to follow another Judge's *findings of facts based on the evidence recorded by him*, when the evidence that may be available before the Judge in a later case may be fuller and more reliable and may tend to lead him to a different conclusion? I am fully aware that one of the maxims governing a Judge in administering justice is — “*Omnia innovatio plus novitate perturbat quam utilitate prodest.*”—“Every innovation occasions more harm by its novelty than benefit by its utility.”

This Judicial Rule “*Stare Decisis*” is discussed at page 69 of the first volume of the 21st Edition of Blackstone's Commentaries where it is said —

‘It is an established rule to abide by former precedents where the same points come again in litigation as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion as also because the law in that case being solemnly declared and determined what before was uncertain and perhaps indifferent, is now become a permanent rule which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments. He being sworn to determine not according to his own private judgment, but according to the known laws and customs of the land, not delegated to pronounce a new law, but to maintain and expound the old one. Yet this rule admits of exception, when the former determination is most evidently contrary to reason, much more if it be contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust it is declared,

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not that such a sentence was *bad law* but that it was *not law*, that is, that it is not the established custom of the realm, as has been erroneously determined.

The course I thought fit to adopt in this case was not adopted without the most anxious consideration. I have carefully studied every line of the judgment of Mr Justice Jardine. I have carefully perused the proceedings in the case and studied the learned Judge's notes of the arguments addressed to him by counsel and the evidence recorded by him. The more I have thought over the case the more convinced I have felt that his "*determination is most evidently contrary to reason and is clearly contrary to the divine law*" as it prevails amongst the believers of the Zoroastrian tenets. It is a decision which to my mind is "*manifestly unjust*"

The error of the judgment of Mr Justice Jardine is proved to demonstration by the evidence both oral and documentary recorded in this case. As this is the first case that came before the Court, and as the judgment is reported in the authorised reports of our Courts, as other learned Judges have accepted the finding as correct and followed it, I think it is very necessary to examine the circumstances under which the parties to that suit obtained the decision, and see whether the learned Judge was not misled into arriving at an erroneous conclusion by the way in which the case was placed before him.

The plaintiff, as the Committee of the estate of a lunatic, goes before the Chamber Judge and applies for leave to join certain other parties in stating a case for the opinion of the Court under section 527 of the Civil Procedure Code. In support of his application he made an affidavit in which he states as follows —

"(3) The said Testator set apart the income of the said one third share in the said Khetwady Bungalow for the performance in perpetuity of certain Private Religious Ceremonies, namely, the Baj Pojnar ceremonies the consecration of the Nirungdin, the recitation of the Yajusni, and the annual Ghambar and Dosla ceremonies "

"(6) I am advised that the devise of the said one third share in the said Khetwady Bungalow is void as being in perpetuity and not for a charitable use "

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On the plaintiff being authorised to state a case for the opinion of the Court, a case is submitted to the Court wherein it is stated that the plaintiff as such committee as aforesaid and the first four defendants contend that the devise is void as being in perpetuity and not for a charitable use, and that failing the trust the plaintiff and the first four defendants were entitled to the property in equal proportions. The fifth defendant was the mother of the first four defendants and executrix of the will of their father. The sixth defendant was the Advocate General.

It does not appear from the proceedings who advised the plaintiff and the other parties that the ceremonies in question in the case were private religious ceremonies and that the devise was void in law. At the time the case was submitted to the Court and previously thereto the solicitor acting for the parties could not possibly have done so, as it is proved in this case that he could have known nothing or next to nothing about the nature of the ceremonies. If a case was submitted to counsel the advice would be valueless in that the counsel advising would probably know less than the solicitor preparing the case. The same solicitors who appeared for the plaintiff appeared for the first five defendants. The Advocate General knowing nothing about the real nature of the Trusts in his capacity as Advocate-General, said nothing but submitted himself to the orders of the Court but in his capacity as counsel he appeared for the first five defendants instructed by the same solicitors as represented the plaintiff and supported the plaintiff's case. Only one witness was examined in the case.

A lurid light is thrown on how the plaintiff's solicitor within a quarter of an hour educated himself on questions that have cost me many days' concentrated attention to understand and in what manner the only witness was examined before the learned Judge in the course of half an hour or so, by the following passage in the evidence of the same witness Mr. Jivanji 'Jamsetji' Mody when examined before me —

In the *Lamburalla* case Mr. Wadia of Messrs. Wadia and Ghandhy came to me and asked me to explain certain ceremonies. The interview lasted for quarter of an hour. Some day subsequently I was asked by a clerk to come to Court. He said the Judge might wish to ask me some question.

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"I demurred to go in that way without notice, but eventually I was persuaded and I came to Court after the fifth hour. I was very shortly examined. I was given no opportunity to explain my evidence and convey the right impressions to the Judge. Mr. Justice Jardine's decision came to me and many others as a surprise."

The learned Judge's note book affords very instructive reading and shows how the case was engineered at the hearing. Mr. Lang appeared for the plaintiff. The acting Advocate-General, Mr. Macpherson, appeared for the first five defendants. These parties had joined hands to defeat the Charity and divide the spoils. Counsel who appeared in the case could know nothing about the Scriptures and the Ritual of the Zoroastrian religion. They must necessarily depend upon the materials supplied to them in their briefs. Stray passages from Dr. Haug's "Essays on Parsis" and the late Mr. Dossabhai Framji's book were read before the Court. Mr. Jivanji Mody was put in the box and such questions as suited the parties were asked. There was no one present to defend Charity or to explain and elucidate the passages read on the evidence given. Cases which have scarcely any applicability to the trusts in question were cited and a spirit of happy unanimity and perfumery seems to have pervaded the discussion of a question of the most vital importance to a whole community, and the combined efforts of the parties led the Judge into forming conclusions that are manifestly erroneous.

The learned Judge observes in his judgment (at p. 417) —

'From the evidence of the priest and the reference made to Dr. Haug's learned Essays, I come to the opinion that the benefits which, according to the belief of the Parsis, result from the ceremonies specified are consolation to the spirits of certain dead persons and comfort to certain living persons, afforded by certain of the Frohars or prototypes of the dead.'

The learned Judge then goes on to say that the objects of these trusts bear analogy to devise of property to "maintain Tombs of deceased relatives" or for a "gift to private company." The judgment ends up by saying —

'There has been no conflict, the parties being of record that the devise is void, and the Advocate General, as representing the Charity, leaving them in the hands of the Court.'

The evidence of the only witness in the case—on a point of such vital importance to a whole community—would not occupy more than one side of fool cap sheet and at the end of the evidence I find a note —

“As counsel for defendants the Advocate General supports Mr Lang's case, as Advocate General he leaves the case to the Court

From a perusal of the records and proceedings in this case one would be led into the belief that the Zoroastrian religion had no Sacred Books, no Scriptures, no religious literature of antiquity or authority—that Scriptures written in Gatha Avesta, Pehlvi and Pazund languages which distinguished scholars of the civilized world had laboured to translate and explain for many years never existed, but that the Zoroastrian religion solely depended on a German Doctor's Essays on Parsis and Mr Dossabhai Framji's interesting book delineating manners and customs prevailing amongst the Parsis and the Bombay Gazetteer. Not a single text from the Scriptures seems to have been cited, not a single book of authority is referred to, not a word appears to have been said as to whether the performance of these religious ceremonies were enjoined by the Scriptures of Zoroastrianism, not a hint is given as to the origin and meaning of the various ceremonies. The only party before the Court—the Advocate-General—whose duty it was to protect the Charity—if of course valid in law—was left in ignorance of the true nature of these ceremonies and he never made an effort to defend the Trust because he must have believed that what was stated in his brief for the defendants for whom he appeared must have been correct, and I have no doubt whatever that those who instructed counsel in the case must in their ignorance have believed that they were putting forth correct instructions.

It never seems to have struck any one in the case that the Trust in question was a religious trust—that it was a trust in “advancement of religion” and as such in law necessarily a charitable trust. It never seems to have struck any one to look at the prayers that are ordinarily recited at the performance of the ceremonies in question to find out whether those prayers

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did not amount to an act of divine worship. The real point in the case was never placed before the Court. The true intent and meaning of the ceremonies required to be performed during the Muktdad days were never so much as mentioned much less explained to the Court. Authoritative translations of the Zoroastrian Scriptures contained in the "Sacred Books of the East" and other works of Oriental scholars were not submitted to the Court for its consideration. Not only evidence which was available in abundance was not given, but the one witness who was examined had no opportunity of explaining or elaborating his answers, but was confined to answers to questions which appear to be framed to suit the purposes the parties had in view. A decision obtained under circumstances such as I have set out can hardly command the confidence of the other parties affected by it. If the community so gravely affected by the decision had a chance of placing all the materials available at the disposal of the Advocate General—the official guardian of all charities—had he been in a position to put the case fully and fairly before the Court—if anything like what is possible to be said in support of the Trust had been said and considered by the learned Judge trying the issue—if there had been some one before the Court who was interested in supporting the trust and had made even an attempt to do so, I might have hesitated before making up my mind to refuse to follow the decision in the case. I feel very strongly that Mr Justice Jardine was misled into coming to the conclusions he did and that the judgment in the case was improperly obtained. I do not use the expressions "misled" and "improperly obtained" in any sense offensive to the parties concerned in the case. I have no doubt they acted according to their lights, but it seems to me it would be a very perverse mind that can—after reading the evidence and exhibits recorded in this case—still maintain that Mr Justice Jardine's conclusions as regards the Muktdad, Baj and other like ceremonies are correct. I will conclude the consideration of this case by recording that I feel that if I had merely followed this judgment and declined to Judge for myself I would have been guilty of shirking a duty cast upon me by my office.

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I am told that this is not the only case on the subject of trusts in respect of Baj, Muktid and other like ceremonies, that since February, 1887, when Mr Justice Jardine decided *Limbucalla's* case discussed above, there have been other cases and that other Judges have come to the same conclusions. The records of the Prothonotary's office have been most carefully searched and every case relating to Muktid and Baj Rojgar ceremonies has been mentioned and discussed before me. In fairness to the plaintiff, who relies on these cases, and in fairness to myself and the course I have adopted, I feel that it is necessary to consider each one of these cases separately—though the review of these cases must necessarily be much shorter than that of *Limbucalla's* case, which was the first of its kind, and which I am clearly of opinion is responsible for the results of every subsequent case. While writing this judgment I have the pleadings, proceedings, notes of counsel's argument and of evidence, all before me, and although it has taken me considerable time to do so, I have carefully considered and scrutinised every paper important or unimportant in all these cases. I will take the cases in their chronological order.

The first case that came before the Court after the decision of Mr Justice Jardine in *Limbucalla's* case<sup>(1)</sup> was *Dinbai v. Hormuzji Dinsha Hodiwalla*<sup>(2)</sup>. It is generally spoken of as *Hodiwalla's* case. A Parsi of Surat by his will directed that the income of the residue of his property should be spent in the performance of religious ceremonies affecting the deceased members of his family. He left a mother who was the plaintiff in the case, and a widow, with whom evidently he was on bad terms and whom he had disinherited by his will—she was the fifth defendant—the first four defendants being the executors of the will. The plaintiff contended that the trust created by the will was void and that she and the fifth defendant, the mother and the widow, were entitled to the residue. Two of the executors did not appear at the hearing—the other two submitted themselves to the Court and the fifth defendant supported the plaintiff's contention. The Advocate General was no party to the

(1) (1887) 11 F. M. 141

(2) (1887) 11 F. M. 141

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suit but he appeared before Mr. Justice Farran, who heard the case, as counsel for the plaintiff. The Advocate General cited Mr. Justice Jardine's decision in *Limbucalla's* case<sup>(1)</sup>, which by then was reported in I L R. 11 Bom, referred to the case of *Yeeap Cheah Neo v Ong Cheng Neo*<sup>(2)</sup>, which was relied on by Mr Justice Jardine, mentioned section 105 of the Indian Succession Act, and then examined the testator's brother as the only witness in the case. The witness purports to explain what was meant by "outlays relating to the dead." He mentions Muktaf, Baj, etc. His evidence in chief consists of seven sentences and his cross examination of two more short sentences. Mr Justice Farran gave no judgment but merely recorded a decree declaring that the bequests in the will were void and that the plaintiff and the fifth defendant were entitled to the residue of the estate. It cannot even be pretended that Mr Justice Farran brought his mind to bear upon the main question in the case. He assumed that *Limbucalla's* case was rightly decided and merely followed it.

The next case is *Dhumbay v Nourroj Domonj and others* known as *Wadia's* case<sup>(3)</sup>. Although it was filed before the *Hodiwalla* case discussed immediately before this—it was heard and decided after that case. It involved very complicated questions of devolution of property. It was heard by Mr Justice Farran also and a decree was passed on the 7th of March 1891. The questions in the suit arose out of an instrument in writing bearing date the 15th of February 1826. It is not necessary for the purposes of this case to go into any other matters in the suit except that portion that relates to the Trust created in favour of Muktaf and Baj ceremonies. Para. 8 of the plaint states —

' By the said writing the expenses of the Baj Rojgar and Muktaf ceremonies of the said Nusservanji Dadabhai, Navrozbai, Dadabhai and Jaji, and the members of the family of the said Nusservanji and Navrozbai together with those for the maintenance of the Fire Temple at Naryore, were directed to be paid out of the income of the Warehouse at Modikhana and the cart adjoining Churniwah, and since the date of the said writing such expenses have been paid out of the said income.'

(1) (1857, 11 Bom 441.

(2) (1875) L R 6 P C 791

(3) (Unreported) Suit No 555 of 1889.

The first issue in the case was:—

"Whether the bequests and charitable trusts are binding and ought to be carried out"

The sixth issue was:—

"Whether in the events which have happened the plaintiff is not entitled to have the charitable and religious trusts carried into effect"

Mr. Justice Farran begins his judgment by saying:—

"Though the property at stake in the suit is not of great value and the friendly spirit in which the cause has been contested shows that its decision is not of great moment."

Referring to the Trusts, he says:—

"Trusts for the performance of Mukta and Rojgar ceremonies have been decided not to be charitable Trusts *Limji v. Dapari*, I. L. R. 11 Bom. 141. That case has been frequently followed and is binding on a single Judge as an authority. The trusts, therefore, not being charitable are void as offending against the law which forbids perpetuities. The fact that the plaintiff and her mother carried out these trusts for a long series of years does not entitle the plaintiff to go on doing so against the wishes of the rest of the descendants of Mithibai."

The findings on the first and sixth issues recorded are in the negative and for the defendants. This case shows that Parsis, as early as 1826, were settling property in perpetuity for the performance of Mukta and Bay Rojgar ceremonies. The passage from the judgment I have set out shows that in this case also the same learned Judge, who heard the previous *Hodiwalla's* case<sup>(1)</sup> has followed Mr. Justice Jardine's decision in *Limbuwalla's* case<sup>(2)</sup> without bringing his own mind to bear on the question of these trusts. But the most startling part of the case is a portion of the decree which runs as follows:—

"This Court doth declare that the religious and charitable trusts in respect of the Bay Rojgar and Mukta ceremonies and the maintenance of the Fire Temple in the town of Nargore in the plaint mentioned are invalid and inoperative and the same are hereby set aside."

The maintenance of the Fire Temple, as I have shown above, is referred to in the plaint. It is not referred to in Mr. Justice Farran's judgment and the discovery of the declaration in the decree that the Trust for the maintenance of the Fire Temple at

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(1) (Unreported) Suit No. 267 of 1880.

(2) 1887 11 Fcm. 461.

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Nargote is invalid and inoperative will come as a cruel surprise to the counsel for the plaintiff. When in the course of his argument he urged that Trust for Baj and Mukhtad ceremonies were not trusts in advancement of the Zoroastrian religion, I asked him to give me some instances of trusts that, according to him, would be really in advancement of the Zoroastrian religion. He instanced a trust for the maintenance of a Fire Temple. It seems to me that the attention of the learned Judge, who in this case was considering many complicated questions of devolution of property, was never drawn to this portion of the trusts. The omission of any reference to this branch of the trust where he sums up the provisions of the writing of 1826 in the beginning of his judgment and merely mentions Baj Rojgar and Mukhtad ceremonies, lends support to my surmise that this particular question could never have been argued before him. I refuse to believe that any Judge of this Court would deliberately declare that a Trust created by a Parsi for the maintenance of a Fire Temple is invalid and inoperative. It appears in the decree because the Judges have nothing to do with the drawing up of decrees unless the parties are at variance and the minutes are spoken to before the Judge passing the decree.

Before leaving the discussion of this case I should like to say that the statement of Mr. Justice Farran that the decision in *Jambuwallas* case<sup>(1)</sup> has been "frequently followed" appears to be erroneous. There was no case between this and *Jambuwallas*'s case except *Hodiwallas*'s case<sup>(2)</sup>, where the same learned Judge followed Mr. Justice Jardine. Mr. Bahadurji challenged the plaintiff's counsel to produce any other case and a strict search in the Prothonotary's office has failed to find any.

The fourth case relating to Baj Rojgar and Mukhtad trusts is what is known as *Gorewalla's* case—*Coxarji, Byramji, Gorewalla v. Peerozdas and others*<sup>(3)</sup>. In this case an attempt was made to uphold the trusts by all the parties other than the first defendant. The trusts were created by a will which was not executed or deposited as required by section 105

(1) (1867) 11 Bom. 451.

(2) (Unreported) Suit No. 267 of 1893.

(3) (Unreported) Suit No. 481 of 1893.

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of the Indian Succession Act. An attempt was made to show that the properties were devised to charity before the will, but the attempt failed, the Court holding that there was no such valid devise previous to the will. There was more evidence given in this case than was given before Mr Justice Jardine, but it was all oral evidence unsupported by any scriptural texts or quotations. Mr Justice Parsons, who heard the case, delivered an oral judgment, notes of which exist. The following passages occur in these notes:

Purposes of alleged Trust are as in number—

- (1) Asodat (presents to priests)
- (2) Supply of sandalwood to temples,
- (3) Performance of Baj Roggar and Muktid ceremonies
- (4) Distribution of alms to the poor
- (5) Outlays on death of relations and
- (6) Good and charitable acts

Of these only numbers 1, 2 and 4 can be held legal and valid.

Baj Roggar and Muktid are only prayers for the death which have been held to be invalid purposes by several decisions of the Court and evidence in the case shows the correctness of the decisions. Outlays on deaths of relations are mere private expenses neither public nor charitable and other good acts is too vague and indefinite an expression to denote anything.

The bequest however, is void as the will was not executed or deposited as required by section 105 of Act X of 1865.

The question as to which, if any, any of the purposes were charitable seems to have been one of academic interest in the case in view of the fact that owing to the will not being executed and deposited in the manner required by section 105 of the Indian Succession Act all bequests for a religious or charitable use would be void.

The several decisions referred to by the learned Judge are only the decisions in the three cases I have discussed previously to this.

Plaintiff's counsel argued that in this case at all events the Court considered the evidence and he points to the words "the evidence in this case shows the correctness of the decision." I have read that evidence, it is very meagre and very incomplete. It is not supported by a single quotation from a reference to the

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scriptures. It seems to me, however, that in this case it was really not necessary to find on the evidence at all, and the finding really never affected the result, as the bequests were void for non-compliance with the requirements of section 105 of the Indian Succession Act. The predominating factors influencing the finding, however, were the "several decisions of the Court" which the learned Judge had in mind.

However be it, it cannot be argued that I am bound to follow this finding—if finding it be—on the evidence recorded in that case, when fuller and far more satisfactory evidence was available in the case before me.

The fifth case in which the question of Baj Rojgar and Muktd ceremonies came up before the Court for consideration was *Maneckji Edulji Allbless and others v Sir Dintka Manockji Petit and others*<sup>(1)</sup>. It is known as the *Allbless* case, and was heard by Mr. Justice Bayley. In the course of the hearing the learned Judge has recorded the following note:

'The Advocate General says he understands Parsi community are not satisfied with that decision (referring to 11 Bom 441) and that he will not object to its being reconsidered.

Evidence has been recorded in this case and much of what I have said as to the evidence in the previous case also applies to the evidence in this case.

In this case the settler had set aside Government Paper of the nominal value of twenty five thousand, and directed that the income thereof should be used for the purpose of performing Baj Rojgar and Muktd ceremonies and also for the purpose of giving "Dinners of Feasts to the indigent poor Parsees and Brances or Persian Parsees respectively who may be disabled by age, blindness or other infirmity of body or mind and who may for the time being be residing in the charitable buildings or asyloms provided for them at or near Malabar Hill near the Towers of Silence". The learned Judge delivered an oral judgment on the 16th of April 1895, and passed a decree declaring "that the Trusts declared in the said Indenture of the 30th day of June 1880 as to Promissory Notes of the Government of India of the

(1) (Unreported) Suit No. 96 of 1892.

nominal value of Rs. 25,000 *are wholly void.*" Thus the remarkable result achieved by reconsidering the decision of Mr. Justice Jardine is not only that the Trusts for Baj Rojgar and Mukhtad ceremonies are void but that a Trust created by a Parsee for feeding the indigent, blind and infirm members of his community, who, by reason of their misfortunes and afflictions, would be inmates of the charitable houses provided for them by their community are also void. This decision requires much understanding, and it is very unfortunate that no authentic note of the judgment exists amongst the records of the Court. The plaintiff's counsel has furnished me with notes of the judgment taken by counsel, and what they show makes it still harder for me to reconcile what the learned Judge is taken down as having found on the evidence with what he decided. One thing is quite clear. The main ground of his decision was the judgment of Mr. Justice Jardine. The following are some of the notes taken by counsel.

"Sanjana's evidence showed that ceremony is for benefit of whole community but especially and primarily for relations of deceased persons"

"The public benefit is extremely small."

"The ceremonies are primarily and principally for the dead and incidentally for the whole community"

"As to feeding of poor attempt has been made to separate the benefit but in my opinion the feeding provision stands or falls with the whole bequest of 25,000 rupees. Witness said Feeding is part of the ceremony following at end of the ceremony"

"As to Baj Rojgar ceremony—trust is void by virtue of Indian Law Reports 11 Bom 411"

"Decision of Farran, J., in 563 of 1883 following above case though unreported as stated by counsel"

"I follow 11 Bombay and hold that the ceremony is a private one, and the feeding a part of the same occasion as the Baj Rojgar ceremonies and the trust for Rs. 25,000 fails and forms part of the settlors estate"

Here we have the first faint indication that the ceremonies were for the benefit of the whole community, though the learned Judge thought the benefit was only incidental and that there was public benefit, although in the opinion of the Court the benefit was extremely small

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The next case is spoken of as *Marbur's case*—*R. R. Dadina v. Advocate-General and others*<sup>(1)</sup>. It arose out of two Trust deeds executed by the late Mr Framji Marbur, and amongst the very many questions that arose, the questions of the validity of Trusts in respect of Baj and Muktsads was one I have perused with care the evidence in the case and Mr Justice Candy's long judgment on the various points arising therein. With reference to the question I am now considering this is what he says

"In *L. N. Banaji v. Bapuji Ruttonji*, 11 Bom 411, Mr Justice Jardine held that trusts for the purposes of performing the following ceremonies were not valid charitable trusts. The ceremonies were

Baj Rojgur, Consecration of Nirangdin Reclamation of the Yajushni Annual Ghan bars and Dosla ceremonies

The only witness called in the suit on this part of the case was Mr Hormusji Chichgur, a solicitor of this Court

Now Mr Hormusji Chichgur was a layman and never pretended to be a Pehlvi, Zend or Avesta scholar, and his evidence is of the most formal description, mostly directed to explain what the Navjote (Investiture of Sacred Thread) ceremony was. He, however, had the courage to tell the Court that the decision in *Limpji Nowroji Banaji v. Bapuji Ruttonji Limbwalla*<sup>(2)</sup> "caused a great shock." Mr Justice Candy had no better materials placed before him than was before Mr Justice Jardine and he merely followed that learned Judge's decision.

The seventh and last case, Suit No 468 of 1895—*Cowasji N. Pochkhanawalla v. Rustonji Dossabhoy Selna*—was also heard by Mr Justice Candy. It is reported<sup>(3)</sup>. The only question argued in the case was one of limitation and on that question the learned Judge, in passing, remarks. "In February 1887 there has been a decision of the Court, *L. N. Banaji v. Bapuji*<sup>(4)</sup>, that the objects of such a Trust were not valid charities."

These seven cases that I have discussed above are all the cases that came before the High Court between 1887 and now. The

(1) (Unreported) Suit No 19 of 1893. (2) (1887) 11 Bom 411.

(3) (1895) 20 Bom 511.

question does not seem to have arisen previous to 1887. These are cases the decisions in which I am asked to follow. When carefully examined, it is clear that in all the cases that succeeded *Limbucalla's case*<sup>(1)</sup> the learned Judges have followed Mr Justice Jardine's decision. When read in the Law Report, where it is published, that judgment at first sight impresses the reader. It tells one how a head priest had expounded and explained the ceremonies, and the result that follows is of course correct if the learned Judge's finding of fact as to the real nature and true meaning of the ceremonies is correct. I have no hesitation whatever in saying that the evidence both oral and documentary, recorded in the present case *demonstrates* beyond any doubt that the learned Judge was led by the parties to that suit possibly unintentionally but undoubtedly *led* into an error in believing that trusts for Day and Mukhad ceremonies were not charitable trusts and as such exempt in law from the application of the rule against perpetuities. In one or two subsequent cases an attempt was made to supply the deficiency in the evidence so palpably apparent in the first case—but the attempt was so feeble—the additional evidence so slender—the further materials supposed to be placed before the Court were so meagre, that it is no wonder that the learned Judges thought it safer to follow than to disturb what they took to be settled law. Studying the evidence with care in the *Gorewalla*<sup>(2)</sup> and *Alibless*<sup>(3)</sup> cases, it becomes quite evident that the whole fault lay at the door of these instructing counsel, for judging from the questions put and the answers elicited from the witnesses, it seems that although witnesses evinced anxiety to lead counsel on the right track, counsel took the witness away into matters which did not affect the real question before the Court. It seems to me amazing that no one in all the cases took the trouble to go to the original sources—the scriptures of the religion, to which the ceremonies belonged—to the sacred writings that are most undoubtedly authoritative, and—to the original texts founding the ceremonies and enjoining the performance thereof. The most important portions of the scriptures of the Zoroastrian religion of the ancient Persians are all translated

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(1) (1887) 11 Bom 441.

(2) (1897) 22 Bom 112.

(3) (Unreported) 1898, 1899, 1900.

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into English by eminent Oriental Scholars and are all contained in the volumes of the "Sacred Books of the East" edited by Professor Max Muller. These Books are easy of access and a complete set is in our Law Library, and yet it is a most inexcusable circumstance that these books have never been touched and nothing in them ever placed before the learned Judges who heard seven successive cases. These cases contain indication that the Parsi "community was not satisfied with the decision" in the case of *Lingji Nowroji Banaji v. Bapuji Rutloji Limbwalla*<sup>(1)</sup> that "it caused a great shock," and yet it is a most remarkable circumstance again that it never struck those affected by the decision to approach the Advocate General—put the case properly before him—put him in funds to fight the case on its true merits, and if necessary take it to the Appeal Court. No Advocate General if properly approached, would have refused to lend the whole weight and authority of his position in making a fight in favour of the charity.

The decisions of all the previous cases have been based on the evidence placed before the Court in each instance. On the evidence the learned Judges came to the conclusion that the Trusts were not charitable in the legal sense of the term and that they transgressed against the rule which forbids perpetuities. These decisions are based on findings of facts on the evidence given in each particular case. It would be sufficient for me to say that it is quite open to me to judge for myself and find on the evidence tendered before me. If, however, it is necessary for me to say, I am prepared to say that in my opinion the "former determination" of Mr Justice Jardine and the other decisions based on that determination appear to me, in the words of Blackstone, in the passage cited above, to be "evidently contrary to reason and clearly contrary to the Divine Law," according to the beliefs of the community professing the Zoroastrian religion, and that they are "manifestly unjust," and I refuse to follow them.

The only question before me in this case is: Is the Trust created by Dinbri for the performance of Mul tad ceremonies a

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Charitable Trust in the legal sense of the word charitable, and as such, exempt from the application of the rule against perpetuities? For the proper determination of the question it is absolutely necessary that in the first instance the true nature and meaning of these ceremonies should be clearly understood, and I will first consider what are Muktaf or Dosla ceremonies, before discussing the law applicable to Trusts for the performance of these ceremonies. Three members of the community of established reputation for great learning and original research in the Scriptures of the Zoroastrian religion, have been examined before me, and numerous passages from the original writings dating from the most ancient times have been cited, explained and put in at the hearing of the suit. Wherever the correctness of any statement of these witnesses was challenged or doubted they were able to refer to the original texts in support of their statements. From the evidence given before me at the hearing, it appears that the Zoroastrian religion is a revealed religion. It was revealed to Zoroaster or, as he is sometimes called, Zarthustra by Ahura Mazda the Supreme Being, who according to scripture, was the only self created Being. The celestial Hierarchy consists of six Amasha Sapentas or Amshaspunds. Ahura Mazda himself is sometimes spoken of as the Chief Amasha Sapenta in which case they would be seven. The Amasha Sapentas are referred to in the Scriptures as the Beautiful Immortals. There come thirty three Izuds. Before bringing into existence the material creation, Ahura Mazda brought into being Fravahrs or Fravashis, and these Fravashis helped the Almighty in bringing into existence all material creation. According to the Avesta Scriptures the first man created was Gayomard, also known as Kayomard. Either he or his great grandson Hoshung was the founder of the Peshdadian dynasty. Historians have not been able to say during what period of time this dynasty reigned over Persia.

This dynasty was followed by the Kaniakan Dynasty which was founded by Kai Kobad. One of the kings of this dynasty was Kai Gustasp, otherwise called Kai Vistasp. In the Scriptures of Zoroastrian religion he is mentioned and referred to. Zoroaster flourished in the reign of this King. The religion revealed by Ahura Mazda to Zoroaster was by Zoroaster

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communicated to King Vistasp and was then promulgated among the people. Oriental scholars and historians have not been able to fix with any certainty the period of the reign of King Kai Vistasp. Many are inclined to fix the period at five or six thousand years before Christ. Dr. Haug believes Zoroaster flourished about 1100 B C. Whereas Professor Darmesteter believes that he flourished somewhere about 600 B C. This, however, is the latest date fixed by any historian or Oriental scholar and all that can be said with some amount of certainty is that Zoroaster lived and flourished considerably before 600 B C. Some of the scriptural writings and prayers, however, are shown to be much older than 600 B C. For instance, the *Lariardin Yast* is said to have been written about 1500 B C and the sounder opinion seems to be that Zoroaster flourished long before 600 B C. The *Kaiaamn* Dynasty was followed by the *Achameunan* Dynasty. During the reign of the last King of this dynasty, Alexander the Great conquered Persia. It is believed that a great portion of the *Avesta* literature was burnt or lost during this invasion and conquest of Persia. Tradition has it that Alexander himself set fire to a library containing *Zoroastrian* scriptures, but many Oriental scholars believe that this is an unjust slur cast on the conqueror of Persia. However that may be, the fact remains that about this period a great portion of the scriptural literature of the ancient Persians was lost or burnt. The period which followed the conquest of Persia by Alexander was, so far as the *Zoroastrians* were concerned, a period of darkness—during which the religion suffered considerably. After the dark ages, came the *Parthian* Dynasty. During the reign of one of the kings of this dynasty the religion of Zoroaster began to revive, and in the reign of the first King *Ardashir Babegan* of the *Sassanian* Dynasty which followed the *Parthian* Dynasty, *Zoroastrianism* became the religion of the King and of the Empire of Persia. In the reign of *Ardashir Babegan*, *Zoroastrianism* became the religion of the State—its scattered scriptures were collected—the *Avestan* writings were translated into the *Pehlvi* language and commentaries were written. The original scriptures that were lost were about this time rewritten and reproduced by men whose forefathers had committed them

to memory and in that way transmitted them from father to son. One of the Sassanian Kings that followed Ardashir Bibekan was Shapur the Second. The greatest Dastur known to the Zoroastrians of all ages—Dastur Dastur Alirbad Mahareshpuni—flourished in his reign. Shapur the Second reigned over Persia from 309 to about 380 A.D. and during this period the Great Dastur composed and wrote the Patet Pashemani, Duva Nam Satayoshni, Tun Darosti and other prayers, and almost all the Afiuns. This great apostle of the Zoroastrian religion is regarded with the highest reverence by all true believers of the Zoroastrian faith and the prayers composed by him are at this day recited and regarded with the very greatest of veneration by the Parsis professing the Zoroastrian faith.

Zoroastrianism flourished in Persia with varying fortune till the persecution of Mahomedans drove the majority of those that professed that religion out of their ancient home. A body of Persians professing the Zoroastrian religion were compelled by reason of religious intolerance and persecution to leave Persia about 1200 years ago. They first took refuge in Kohistan, where they remained for about 100 years—they then went to the Isle of Ormuz where they remained for about 19 years. They then came to Diu, near Kattyawar and remained there for about 15 years. From Diu they came to Sanjan, and there they settled down for very nearly 700 years. From Sanjan they spread over various places in the Gujarat district and their principal headquarters now are Bombay, Naosari and Surat. A sprinkling of Parsis are to be found in several villages in Gujarat. They derive their present name Parsi from Pars, in Persia, from which place they originally came to India.

It was their staunch adherence to their own religion and their refusal to adopt the religion of their Mahomedan conquerors that was the cause of all the sufferings they had to undergo. They preferred to leave their country and exile themselves to a foreign land rather than give up the religion of their forefathers. They have persevered in their religious beliefs, preserved their old institutions and customs and have in the country of their adoption continued to follow the ancient religion of their

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ancestors One of the most solemn ceremonies enjoined by the religion promulgated by Zoroaster is the performance of certain religious ceremonies during the Muktad days The Muktad days are otherwise known as Dosla or Farvardgan days These Farvardgan days are days that are sacred to the Furohurs

Before proceeding with the consideration of the ceremonies themselves, it is very necessary to have clear conception of what the Furohurs are, according to the Zoroastrian scriptures The Furohurs are constantly referred to in the Sacred Books of the Zoroastrians, and are the same as Fravashis "Furohur" is the modern Persian name Fravashi is the corresponding Avestaic name. In *Lambuwalla's* case<sup>(1)</sup> Mr Justice Jardine says —

"According to Dr Haug these *Furohurs* were originally the departed souls of ancestors, comparable to the *pitras* of the Brahmins and the *manes* of the Romans Now they are regarded as Guardian Angels, each being of the good creation having one "

That this is an error is shown in the case both by the oral evidence of the witnesses examined before me as well as by copious quotations from the original scriptures The same error that Dr Haug commits is also committed by Professor Darmesteter, who in his Introduction to the Farvardin Yast, says —

"The Fravashi is the inner power of every being that maintains it and makes it grow and subsist. Originally the Fravashis were the same as the *Pitris* of the Hindus or the *Manes* of the Latins that is to say, the everlasting and deified souls of the dead"

All the three witnesses in this case are profound scholars of the Zoroastrian scriptures, whose opinions are entitled to far greater weight, agree in saying that what is stated above by Professor Darmesteter and Dr. Haug is erroneous, and they have quoted passages from the original scriptures in support of their view Dastur Darab in his evidence says —

"In his introduction to the Farvardin Yast, Professor Darmesteter says that the Fravashis were originally the same as the *Pitris* of the Hindus or *Manes* of the Latins This, according to my opinion is incorrect; it is merely the conjecture of Professor Darmesteter According to the Avesta the idea of Fravashis is that they are Spiritual Existences which were brought into being by the Almighty *before* he created the Universe. They came into

(1) (1887) 11 Bom 411 at p 116.

being *before* all material creation every man born or unborn has a Fravashi of his own, according to the Avesta. After the birth of the man or woman his or her Fravashi watches over his actions and guides him to the right path. The Fravashi protects him or her from all evil. After death the Fravashi goes to heaven and the soul, according to his deeds goes to heaven or hell as it deserves. According to Zoroastrianism the Fravashi is not responsible for the man's good or bad actions. The soul is responsible for all acts committed in life. Inanimate objects have their Fravashis too. The Fravashi aids both animate and inanimate objects—inanimate objects in their moral and physical development, inanimate objects in their growth and development."

"Farohurs are not souls of the dead. They are totally different Entities. Souls of the dead are known as Ravan. Ravan is the Persian word for the soul of the dead. The Avestan word for the soul of the dead is Urvan."

Ervad Jivanji Mody confirms this. He says—

"The Fravashis are quite distinct from the souls of the dead or from the souls of the living. Fravashis and souls are not identical in any respect." \* \* \* the souls and Farohur are two distinct Entities. That appears from various parts of the Zoroastrian scriptures.

The witness then points out several passages which are put in and marked Exhibits Nos 22, 23 and 24 in support of his statement, and then goes on to say,

"There are similar passages in various religious books making similar distinctions between the soul (Ravan) and Farohur. A human being is said to possess both soul and Farohur. The function of the Farohur during a human being's life is to guide the soul in paths of virtue. After a man's death the soul meets with the consequences of its actions in the world. The Farohur mixes with the other Farohurs of the world or goes to its abode in Heaven."

Ervad Shernarji Bharucha, who followed Mr Jivanji Mody, confirmed the views of the previous witness. That the view of the total distinction between the soul and the Fravashi of a human being is absolutely correct appears from the following original scriptural passages placed before the Court

"And (having invoked them) hither we worship the spirit and conscience, the intelligence and Soul and Fravashi of those Holy men and women who early heard the lore and Commands of God."

(Yasna Ch 26, para. 4, "Sacred Books of the East" Vol. 31, page 278, Exhibit No 18)

"We present hereby and we make known, as our offering to the bountiful Genius which rule (as the leading chants) within (the appointed times and seasons of the liturgy, all our landed riches, and our persons, together with our

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very bones and tissues, our forms and forces, our consciousness, our *Soul and Fravashi* :

(Yasna Ch. IV, para 1, "Sacred Books of the East," Vol. 31, page 291 Exhibit No. 22)

'Yea, I desire to approach the Fravashis of the Saints with my praise, redoubted (as they are) and overwhelming, the Fravashis of those who held to the ancient lore, and Fravashis of the next of kin, and I desire to approach towards the *Fravashi of mine own Soul* in my worship with my praise'

(Yasna Ch. XXIII, para 4, "Sacred Books of the East," Vol. 31, page 273, Exhibit No. 23)

"All pure Heavenly Yazatas we praise—all earthly Yazatas we praise—we praise *our own Souls—We praise our own Fravashis*. Come hither to help me, O Mazda. The good strong holy Fravashis of the pure we praise

(Khorsed Njaz—Spiegels 'Avesta' volume III, p. 7, Exhibit No. 24)

These are not by any means the only or solitary passages in the holy writings showing that the soul is entirely different and distinct from the Furohur. Ahura Mazda Himself, the Creator of the Universe, has a Fravashi of his own. In Chapter 26 of the Yasna, paragraph 2, we find this passage —

"And of all these prior Fravashis we worship here the Fravashi of Ahura Mazda, which is the greatest and the best, the most beautiful and the firmest, the most wise and the best in form and the one that attains the most its ends because of Righteousness. ("Sacred Books of the East," Vol. 31, page 278)

Paragraphs 85 and 86, Chapter 21 of the Farvardin Yast (Exhibit No. 2) ("Sacred Books of the East," Vol. 23, page 200) shows that not only are there Fravashis of human beings, but there are Fravashis of the Holy Creation and of inanimate objects, such as fire, water, sky, plants, the earth, etc.

By far the best description of what is the true conception of the Zoroastrian religion regarding Furohurs that I have come across is contained in Nasib Dastur Rustumji Peshotan Sanjana's very learned book "Zarathustra and Zoroastrianism in the Avesta," at page 212. He says there —

'Before proceeding further it would be useful to say a few words about the signification of the term Fravashi that so often occurs in our Sacred writings. The word is derived from Fra—forward, and vared, or vakhsh—to grow, to increase, to advance or to cause prosperity. Fravashi is then, that animating power in a being which causes growth, increase,

advancement or prosperity. The Avesta tells us that all beings including Ahura Mazda Himself, have got their own Fravashis. The earth, the fire, the sky, the water, the plant the animal, the Blessed Shrosh, the truest Rashna Mithra, Mathra Sapenta and all other things either material or immaterial, have been endowed with that power which tends to preserve and promote their well being. Man also possesses it. . . . The Fravashis of living holy men are more powerful than those of the departed. From the former the world derives benefit directly, whereas from the latter only indirectly through their good example and influence.

It is through the Holy Fravashis that the earth, the water the plant the animal, and all other things both animate and inanimate, are preserved and promoted in this world.

With reference to this quotation, I think it is necessary to mention that for every statement made therein the learned author has cited authority in his footnotes. Professor Darmesteter seems to suggest that the conception of Furohurs as given in the above passages is a conception of a later date, for in his introduction to the Farvardin Yast, after saying that the Furohurs are the same as the Pitris of the Hindus and Manes of the Latins, he goes on to say —

' In course of time they found a wider domain and not only men but goods and even physical objects, like the sky and the earth etc., had each a Fravashi '.

There is only one remark to be made in connection with the opinion of Professor Darmesteter about this conception of Fravashis having come into existence in later times and that is that it is entirely contradicted by the original scriptures from which I have quoted passages above. The witnesses in this case who aver emphatically that this opinion is erroneous and that the souls of the dead and the Furohurs are totally different and distinct and have nothing in common, are supported by original scriptural text. Para 56 of the Farvardin Yast (" Sacred Books of the East," Vol 23, p 195) proves that the Fravashis were brought into being and were already in existence before the Almighty created this world. The para runs —

"They are the most effective amongst the creations of the two Spirits, they the good strong beneficent Fravashis of the faithful who stood aloof assisting the two Spirits created the world the good Spirit and the evil one '.

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It is true that in that portion of the original Gathas that remains to us there is no reference to the Fravashis, but Ervad Sherinji points out that the earliest reference to the Fravashis is in the Haptang Yast, which is a portion of the Yasna. It is written in the Gatha dialect, and therefore, he contends, it must have been written very near the time that the Gathas were written. The plaintiff's counsel was throughout the hearing most ably assisted in the conduct of his case by men who have made a study of the scriptures relating to the Zoroastrian religion, but he was not able to cite one single text or passage which could even remotely support the theory that Fravahurs and souls of the dead were one and the same thing. This theory is the foundation on which the judgment of Mr Justice Jardine is based in *Limbwalla's case*<sup>(1)</sup>. After a perusal of the evidence recorded in this case—principally the evidence from the Scriptures themselves—I do not think there is any possible room to doubt the conclusion that the theory that Fravahurs and souls are the same or have anything in common is wholly and absolutely fallacious. That this is the conviction forced upon the mind of the counsel for the plaintiff himself after a study of the subject, seems to be fairly clear from the following questions he put to Dastur Darab:

*Question*—‘Those who have read the Scriptures know the difference between Fravashis and Souls: but is it not a general belief amongst those who have not read the Scriptures that Muktad ceremonies bring benefit to the Souls of their deceased relatives?’

*Answer*—‘They believe that the Souls are pleased. They believe that one of the benefits is that the Souls get pleasure and satisfaction.’

*Question*—‘Was the distinction between Fravashis and Souls which is so well known now generally known amongst the Parsis 30 years ago?’

*Answer*—‘It was known but I cannot say what was generally known 30 years ago.’

Once it is established that the Fravashis were created before the world and came into existence before any human being was created, it is impossible to believe that they are the same as the souls of the dead. Besides, how is it possible to conceive that the Fravashis of Immortal Amasha Sapentas, or Archangels, and

Izuds, or Angels, and the Fravashis of inanimate objects, like the sky, earth and water, be the same as the souls of the dead. The clear and lucid exposition of the real nature and meaning of what the Furohurs are according to the religion of Zoroaster that has been given by the witnesses in this case, supported by original texts, destroys the very foundation on which the whole fabric of *Limbwalla's* case<sup>(1)</sup> is constructed.

Having seen what the Furohurs are according to the scriptures of the Zoroastrians, I think it is necessary here to examine shortly what those scriptures are that have remained to us at the present day and are available to us for authoritative reference. It appears from the study of the literature now available to us that in the most ancient times when Zoroastrian religion came into existence, there were 21 Nasks (books) of the Avesta scriptures. All except about a fifth part of these holy writings are lost. What remains to us of the original 21 Avesta Nasks are the Vendidad, the Yasna, the Visparad, and the Khordoh Avesta. Of these the oldest are written in the Avesta language, the next in antiquity are written in the Pehlvi language, and then come those that are written in the Pazund language.

The *Vendidad* is a Code of 72 Religious Social and Moral Laws of the ancient Iranians, and it also contains an enumeration of sins and their punishment both here and hereafter.

The *Yasna* or *Yejusnt* consists of 72 chapters. The five Gathas form part of the Yasna chapters. The Gathas are hymns expressing philosophical thoughts on the teachings of the Prophet Zoroaster and on the good Spirits the Amasha Spentas and the Izuds that work with the Dasty. The Yasna contains invocations to the various Izuds and describes their several functions. It also contains liturgical directions and prescribes the Ritual to be observed at the performance of certain ceremonies.

The *Visparad*, consisting of 23 chapters, mostly contains invocations to the Amasha Spentas and the Izud.

The *Khordoh Avesta* contains Afringans, Gheh Nyaz, Yast, Patets, Afrins and certain other prayers.

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Besides the Nasks that remain to us we have various other books of antiquity and authority which are accepted by the Zoroastrians as forming a part of their religious scriptures.

One of such books is the *Dinkard*. It is the compilation of Dastur Atro Froba, and is ascertained to be written a thousand years before now. Dastur Darab has already translated a portion of this work and he is engaged now in translating other portions of it. Dr. West's translation of the *Dinkard* is in the 37th volume of the "Sacred Books of the East" and is prefaced by an exhaustive Introduction giving the nature and character of the composition. Dr. West says: "It is evident that the compiler intended, in the first place, to give merely a very short account of the general contents of each Nask, to be followed by a detailed statement of the particular contents of each chapter, etc."

Another work of authority is *Shayast La Shayast*, meaning the Proper and Improper. Its translation in English is in the fifth volume of the "Sacred Books of the East." The Introduction describes it as "a compilation of miscellaneous laws and customs regarding sin and impurity with other memoranda about ceremonies and religious subjects in general." Dastur Darab points out a reference in the book to the Hasparam Nask, which existed originally in the Avesta language, as showing that the author had drawn his materials from the original Nasks before they were lost, because the Hasparam Nask is one of the original Nasks that are now lost to us. *Shayast La Shayast* was written about the end of the Sassanian dynasty—in the middle of the 7th century Anno Domini.

Another ancient compilation which is regarded as a book of authority relating to the Zoroastrian religion is the *Sad Dar*, which literally means a hundred subjects. Its age and authorship is lost in antiquity. Its English translation appears in the 24th volume of the "Sacred Books of the East" and the introduction states that it is generally accepted as a work of "important authority" and contains a "convenient summary of many of the religious customs handed down by Pehlvi writers."

The *Nirungistan* is another book relating to Zoroastrian scriptures. It is a Pehlvi composition and its author is unknown.

It came into existence some time between 226 B C and 600 A D "The whole book," says Ervad Sheriarji, "is a ceremonial code, or rather a manual or guide book for priests. The book deals with the duties functions and rules relating to the Ervads or ordained Priests." This book is published by the Parsi Punchayat and Dastur Darab has written an introduction and given the various meanings of the words in the original texts.

These, according to the evidence given before me are the principal authoritative scriptural writings, governing the Zoroastrian religion.

I will now consider what are the Muktad, Dosla or Farvardigan days. All these three expressions refer to the same thing. The three fundamental beliefs of Zoroastrianism, or the three Essentials of Zoroastrian religion as Ervad Jivanji Mody calls them, are —

- (1) Belief in the existence of One God—Ahura Mazda.
- (2) Belief in the Immortality of the soul and
- (3) Belief in the responsibility hereafter for good and bad acts done on earth.

The Zoroastrian religion as revealed to Zoroaster by Ahura Mazda and communicated by Zoroaster to King Vistasp and his other disciples, contemplates no sects or sections, the community of believers in Zoroastrianism are all Mazdayasnians. Through a mistake in the calendar, however, there is a difference of opinion amongst the Parsis of the present day as to the date when their year ends and the new year commences. The larger section, the Shenshais, believe that their new year commences in the middle of September, while the smaller sect, Kadmis, believe that the new year commences a month earlier. There is no other difference between the sects so far as religious beliefs are concerned. The Zoroastrian year consists of twelve months each of thirty days. But at the end of each year occurs five Intercalary days which are known as Gatha Ghambars. These are the holiest days of the year. The winter ended the old Iranian year. The Muktad ceremonies are enjoined to be performed at the end of the year. The majority of Parsis in India regard eighteen days as Muktad or Farvardigan days. Dastur

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Darab thinks the first and the last two days are not really Farvardigan days, but that real Farvardigan days are fifteen—namely, the last five days of the last month of the year—the five Gatha Ghanbar days, and the first five days of the new year. Erval Jivanji also says that according to the common practice prevailing amongst Parsis both in Bombay and the Mofussil, Farvardigan days are eighteen. A very small minority of the Parsis of the present day are, however, of opinion that the real Farvardigan days are only ten, and they say the first five days of the new year are not really Farvardigan days. How this difference arose is fully explained in Erval Jivanji's book, an extract from which is Exhibit No. 25. However that may be there is no question that the Farvardigan days whether they be eighteen, fifteen, or ten according to each individual's honest beliefs, are days which are regarded by Zoroastrians as days of the greatest sanctity. There are very few outward ritualistic practices amongst the Parsis. The principal form of profession of faith—the discharge of the religious duties and obligations—the main observance of religious rites,—consists in reciting prayers and having prayers recited by their Mobeds or Priests.

All witnesses agree in saying that the Farvardigan days form the most important festival in the Zoroastrian calendar, and that the ceremonies performed during the Farvardigan days form the most important ritual of the Zoroastrian religion. They agree in saying that the performance of the Mukhad ceremonies during the Farvardigan days is enjoined by the Zoroastrian religion—that those ceremonies are acts of great religious merit—they form the most important portion of their divine worship, and that according to the beliefs of those that profess the religion the performance of the Mukhad ceremonies not only brings down the blessings of the Almighty on the party performing them and his household but on the whole community, be they Zoroastrians or non-Zoroastrians—their King and his Satraps, and on the whole universe. They are ceremonies that involve praise, adoration, propitiation, recognition and worship of the Supreme Being from all his creatures here below. The non-performance of the Mukhad ceremonies is, according to the scriptures, a sin which is taken into account

when, after death, a man's good and bad actions are weighed and reward or punishment is meted out to the soul

It must be remembered that what I have summarised above are statements made by three of the most eminent living oriental scholars and profound students of Avestaic—Pehlvi and Pazund—literature relating to Zoroastrian religion. In what they have said they are in entire accord with one another and for every statement made by them they have quoted chapter and verse from the original scriptures.

It is said that Mr. Justice Jardine's finding in *Jamburalla's* case<sup>(1)</sup> "that the benefits which, according to the belief of the Parsis, resulting from the ceremonies specified, are consolation to the spirits of certain dead persons and comfort to certain living persons, afforded by certain of the Fuzuhis or prototypes of the dead," is in accordance with the belief prevailing amongst the Parsis of the present day. The plaintiff's counsel points to the phraseology of the settlement in the present case "Annual Muktd ceremonies of the dead members of the family in both sects Shinshais and Cudmis." It is possible that from the fact that the dead of a party performing the ceremony being incidentally remembered during the recitation of some of the prayers, the ignorant and the illiterate members of the community may have formed an erroneous belief that the Muktd ceremonies are performed merely for the benefit of the souls of the dead. It has not, however, been seriously argued before me that the Court is bound to be guided by erroneous impressions produced on the minds of ignorant members of the Parsi community. One has only to read the very clear and convincing evidence given in the case and to refer to the scriptural passages placed before the Court to come to an unhesitating conclusion that the Muktd ceremonies performed during the Farvardigan days have *nothing whatever* to do with the souls of the dead and have not the least tendency of conferring any benefits on the souls of the dead members of a family. The ceremonies enjoined to be performed during the Farvardigan days are not in any way connected with the souls of the dead and the suggestion that they are

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is contradicted by the scriptures and the tenets of the Zoroastrian religion. All the ceremonies for the souls of the dead are performable on certain days calculated from the date of the death. We have first, ceremonies performed for the benefit of the souls of the dead for the first three days, and on the fourth or Chaum day. Then follow the Dasma, or the tenth-day ceremony, next the Massisa, or the thirtieth-day ceremony—next the Chhumsi, or the sixth-monthly day ceremony, and then the Varsi or the anniversary of the day of death. In some families the anniversary ceremony is performed for several subsequent years. All ceremonies after the first three days are more or less commemoration ceremonies; for if the scriptures are true, nothing that one can do affects the soul or redounds to its benefit after the fourth day. According to the beliefs of the Zoroastrians founded upon their ancient scriptures, the soul of the dead remains in the place where death takes place for the first three days. On the dawn of the fourth day the soul ascends and reaches the Chinwad Bridge. There the Angels weigh its good deeds and its evil acts during its sojourn on earth, and if the good deeds outweigh the bad ones by certain Cetr, the soul is allowed to cross the bridge and enter the abode of Heaven. If, however, its evil outweighs its good deeds by certain Cetr it is thrown from the bridge into hell below. On the fourth day reward or punishment is meted out to the soul and the *Judgment is irrevocable*. There is nothing in the scriptures for the redemption of the soul after the final judgment of the fourth day. How then can it be said that any ceremony or prayers performed or recited after the fourth day can tend *towards or can be intended for the benefit of the soul*? That the Muktds have no connection with the souls of the dead, is, I think, also clear from the fact that the time of their performance has no reference to the date of the death of individuals.

If the belief exists in the minds of some that Muktds are intended for the benefit of the souls of the dead, it clearly is an erroneous belief for which there is no foundation whatever, and can only exist amongst the ignorant and the illiterate. In the Zoroastrian religion no days during the year are as holy as the Fervardigan days and no ceremonies so sacred as the Muktd

ceremonies The observance of the Farvardigan days and the performance of the Muktaḍ ceremonies is enjoined by the Zoroastrian scriptures Paragraphs 49 to 52 of the Farvardin Yast show that the Zoroastrians are asked to perform certain ceremonies during the Farvardigan days

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The Farvardin Yast is written in the Avestan language, and its earliest age is said by some scholars to be 1500 B C, whilst others give 600 B C as the date when it came into existence Dastur Darab and Professor Max Müller are of opinion that the former date is correct.

This Yast is dedicated to the Furohurs and is a glorification of the powers and attributes of the Furohurs in general. On the Farvardigan days the Furohurs "come and go through the Borough—they go along for ten nights asking this"—(Para 49)

'(50) Who will praise us? Who will offer us a sacrifice? Who will meditate upon us? Who will bless us? Who will receive us with meat and clothes in his hands and with prayer worthy of bliss? Of which of us will the usmo be taken for invocation? Of which of you will the soul be worshipped by you with a sacrifice? To whom will this gift of ours be given that he may have never failing food for ever and ever?' (Exhibit No 1)

Paragraphs 49 to 52 and the concluding paragraphs, more particularly paragraph 157, of the Farvardin Yast, have been very fully discussed before me Great light is thrown on the meaning of paragraph 50 by the explanatory Exhibit No 20 It seems from the evidence of the witnesses that all the ceremonies performed during the Farvardigan days take their origin from para 50, and the concluding paragraphs show that if a Zoroastrian performs these ceremonies the Furohurs "will leave the house satisfied and carry back from here hymns and worship to the Maker Ahura Mazda and the Amesha Spentas." Exhibit No 20 is a transcript of the original paragraph into Gujarati characters and then the meaning and the indication of each expression is explained in English All the witnesses say that Exhibit 20 gives a correct exposition of the meaning of para 50 of the Farvardin Yast The plaintiff's counsel complained that it was prepared for the purposes of this case His original information was that it was prepared by E-val Sher... h3

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subsequently ascertained that it was prepared by the Advocate-General's Solicitor, Mr. Vinadalal. Nobody ever pretended that it was not prepared for the purposes of the suit.

All I can say of it is that it has been extremely helpful to me in understanding the true spirit of the paragraph, and evidences both knowledge and learning in the party who prepared it.

When the Furohurs come down to the earth during the Farvardigan days and ask for the performance of the ceremonies as mentioned in para. 50 of the Farvardin Yast, they go on to say,

(51) 'And the man who offers them up a sacrifice with meat and clothes in his hands, with a prayer worthy of Bliss the Awful Fravashus of the faithful satisfied unharmed and unoffended bless thee --

(52) 'May there be in this house flocks of animals and men! May there be a swift horse and a solid chariot! May there be a man who knows how to praise God, and rule in an assembly, who will offer us a sacrifice with meat and clothes in his hand and with a prayer worthy of bliss

There can be no doubt that the performance of certain ceremonies during the Farvardigan days is enjoined as the duty of every true Zoroastrian by Ahura Mazda himself. In the Bahaman Yast, para. 45, Ahura Mazda speaking directly to Zoroaster, reveals to him in a prophetic spirit that the Farvardigan ceremonies will not be performed with the same devotion they should be performed in the troublous times in the future.

He says to the Prophet --

(40) "And they practise the appointed feasts of their ancestors the propitiation of Angels, and the prayers and ceremonies of the season Festivals and Guardian Spirits in various places yet what they practise they do not believe in unhesitatingly, they do not give reward lawfully and bestow no gifts and alms and even these they bestow they repent of again (Exhibit No 5)

This passage is explained by Dastur Darab as follows --

"Farvardigan is one of the appointed feasts referred to in the passage, instead of 'appointed' I would translate the text as established. The original text is Nibatak in Pehlvi which means established by revelation and followed by the Ancients. The Farvardigan ceremonies are ceremonies which are appointed by the Deity Ahura Mazda and it is the duty of every true Zoroastrian to perform the ceremonies during the period fixed for them. The 'prayers and ceremonies of the season festival' referred to in

the passage are the Ghambais and the prayers and ceremonies of the guardian spirits are the prayers and ceremonies said and performed during the Farvardigan days

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The Bahaman Yast, in which this passage occurs, is the Pehlvi translation of the original Avestaic text and is dedicated to Bahman, who is one of the Amesha Saptas. The original Avestaic text is lost, but a translation in Pehlvi has been preserved. The age of the Bahaman Yast is the same as that of the Farvardin Yast. In the Introduction to its translation at page 50 of Vol V of the "Sacred Books of the East" it is stated that the Bahaman Yast 'professes to be a prophetic work in which Ahura Mazda gives Zoroaster an account of what was to happen to the Iranian nation and religion in the future'. Farvardigan days and Muktd ceremonies are also referred to in the Dinkard (see Exhibits Nos 3 and 4), in the Shayast Li Shayast (see Exhibit No 6), and in the Sad Dar (see Exhibits Nos 7 and 8). There is also a reference to the Farvardigan days in the Patet Pashemani (see Exhibit No 9). Though the temptation to set out all these passages and comment on them is great, I feel that there would be no limit to this judgment if I yielded to the temptation. Dastur Darsb in his evidence has given very clear explanations of these passages, and I must content myself by merely recording that the various passages from the scriptural writings placed before the Court and explained by the witnesses leave no doubt in my mind that the Farvardigan days are the days appointed for the performance of the Muktd ceremonies—that the performance of those ceremonies is enjoined by the religion of Zoroaster—that it is a duty cast on every Zoroastrian by his religion to perform Muktd ceremonies—that the performance of those ceremonies is an act of great religious merit which brings to the man who gets them performed Hathim or Great Reward (Exhibit No 7) and that the non performance of them is a great or what is always spoken of as a Bridge Sin (Exhibit No 8). Exhibit No 9 is a passage from Patet Pashemani (Prayers of Penitence) wherein the non-observance of Farvardigan days and the non performance of the ceremonies prescribed for those days are referred to as sins for which the man praying expresses his penitence.

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The usual ceremonies to be performed during the Farvardigan days are five in number, (1) The various kinds of Afringans with the Debacho preceeding them and the Afrins following them, (2) Baj, (3) Satoom, (4) Furroksbi, and (5) Yejusni. Of these, the Afringans, Baj and Satoom ceremonies are compulsory and must be performed. Dastur Darab thinks the Furroksbi ceremony must also be performed but Ervad Jivanji says it is performed by some and not by others. Yejusni is a very complicated, long and expensive ceremony, and only the well-to-do members of the community can afford to have them performed and it is optional with Zoroastrians to perform it or not. The Debacho of the Afringans precede all the Afringans. It is an invocation of all the Furohurs including those of the persons who are specially mentioned on the occasion. In the Debacho, the priests mention the name of the town or city where the prayers are recited and they pray for plenty, joy, victory and happiness. The plenty, joy and happiness prayed for is for the inhabitants of the town or city, and the victory prayed for is the victory of the Sovereign over all his enemies. Ervad Jivanji, in the course of his evidence has told the Court that the benefit or help that is asked of the Furohurs in the prayers offered during the Farvardigan days is asked not only for the individual who invokes such help and asks for such benefit, not only for the whole Zoroastrian community, but for all human beings. Here it may be mentioned that in *all* the prayers recited by a Zoroastrian he never prays for himself alone. He prays for the community and for all peoples quite independently of their being Zoroastrians or otherwise. He is utterly unselfish when he approaches the Almighty and asks for His blessings. He asks them for all, he prays for universal joy, universal prosperity and for the well being of all men of good life.

The English translation by Bleek of the Debacho to the Afringans is given in the third volume of Spiegel's Avesta and marked as Exhibit No. 10 in the case. The different Afringans are described at some length by Dastur Darab in his evidence, and I do not think it is necessary to discuss them here except perhaps to refer to the Afringan Ghambar, which is not included in any of the Yasts and which contains prayers for the

*Sovereign* Paragraphs 14 to 18 of this Afringan Ghambar, which is Exhibit 14 in the case, contain solemn prayers for the Sovereign of the country, and for all his Satraps and Vice regents. As translated by Dastur Darab, the prayers begin with the following sentence —

“In the name of Ahura Mazda the resplendent and glorious I bless with my prayers the Rulers of the country the Chief of all Rulers of the country.”

The prayers then go on to invoke the blessings of the Creator on the Sovereign, and on all his representatives. They contain supplications for his health and his happiness, and pray for his long reign and for victory over all his enemies. These four paragraphs are recited at the end of every *Afringan* and Dastur Darab says that,

“This Blessing on the Rulers and the Chief of the Rulers is quite independent of the Rulers or the Chief Ruler of the Rulers being a Zoroastrian or not. This blessing, whenever recited, would apply to our King Emperor and all subordinate Rulers under the Empire.”

Ervad Sheenari, in his cross-examination said,

“It is not correct that in that passage (Exhibit No. 14) Zoroastrian Sovereign is meant. It means any Sovereign—any good Sovereign who reigns wisely, justly and well.”

Referring to the same paragraphs, Ervad Jivanji Mody in his cross-examination said —

“Reading the passage at page 371 (Exhibit No. 14) I say that this does not refer to a Zoroastrian Sovereign alone. It means any Sovereign or Ruler. The passage was recited at the Allbleas Lag on the occasion of the Coronation of our present Sovereign and that shows that every Zoroastrian has understood it in the sense that it refers to Sovereign not necessarily Zoroastrian.”

After the *Afringan* follow the *Afrins*. They are not the same, like the *Debache*, but vary with different *Afringans*. Shortly stated, *Afrins* are invocations to God to make men pious and virtuous, to send down His Blessings on all mankind. All the five ceremonies are described and explained in Dastur Darab's evidence and I do not propose to discuss them here separately.

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All the ceremonies referred to above have to be performed by priests. From the most ancient times a distinct and separate class, the priests, have existed amongst the Iranians, and their only source of livelihood is the fees they receive from their lay brothers for the performance of religious ceremonies. Some of the officiating priests observe the Burushnoom, and they alone can perform certain ceremonies, whereas the ordinary officiating priests who do not observe the Burushnoom are entitled to perform certain other ceremonies. A certain number of descendants of the priestly class have taken to earning their livelihood in other walks of life, and this class is known amongst the Parsis as Athornans. Messrs. Padshah and Kanga, who have rendered such valuable help in this case are, for instance, distinguished members of that class. Zoroastrian liturgical ceremonies are divided into two classes, the inner and the outer liturgical ceremonies. The inner liturgical ceremonies can only be performed in an Agiary or Atash Behram, and only by priests who have gone through the Burushnoom, and are observing all its requirements. The outer liturgical ceremonies are ceremonies which can be performed outside an Agiary or Atash Behram, that is, at the private residences of the members of the community, and can be performed by priests who are not observing the Burushnoom. The main distinction is not so much in the place as in the priest performing the ceremony, for even the inner liturgical ceremonies may be performed in a private residence if there is a separate place which is cleansed, purified, and temporarily consecrated for the performance of those ceremonies—but in no event can they be performed by any priests other than those who are observing the Burushnoom. The inner liturgical ceremonies are the Yejushni, Baj, Vendidad and Visparad. The outer liturgical ceremonies are the Afriagans, Furrokshi and Satoom.

An officiating priest must go through the Nahao and Martah ceremonies. No layman is allowed to go through these ceremonies—the man going through these ceremonies must be a member of the priestly class.

Ervad Sheriarji says :

"From the most ancient times—from the time of Herodotus, the priests as a separate class have existed amongst the Zoroastrians. They were called

the Mag and in the performance of religious ceremonies the presence of a Magus was always necessary. There is historical evidence of this in existence. Herodotus wrote about the customs prevailing amongst the Zoroastrians in his own times which was 400 B C. See Rawlinson's Herodotus Vol I pages 217 and 218.

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Dastur Darab, in the course of evidence, said that with the exception of Baj and Yejusni a layman may perform the other ceremonies if he is very poor. He said if a man can afford it he must employ a priest, because a priest is supposed to be more pious and is more conversant with the ceremonies. This led to a little misunderstanding, which was cleared up when Dastur Darab explained that what he meant was that it is a duty cast upon every Zoroastrian to get these or some of these ceremonies performed by the priests during the Muktd days, and that the non performance of them was a great sin. Where a Zoroastrian is so situated that no priest is available or where he is so poor that he cannot afford to employ a priest, rather than not have them performed he ought, in the opinion of the witness, to try and perform them himself. He admitted that he had never known a layman perform these ceremonies. Whatever may be Dastur Darab's opinion on this point the fact remains that from the most ancient times the Magi in the olden times and the Mobeds or priests in the more recent times, have always performed these ceremonies and the scriptures of the Zoroastrians contemplate that they shall be performed by the priests. For instance, the very Debache of the Afringan shows that that ceremony is performed by the priest, for at the very outset, the priest says — 'I have performed the offering. I have offered the Daruns. I now offer the Mayazd.'

No layman could say "I have performed the offering and I have offered the Daruns."

It has been the universal practice existing amongst the Zoroastrians for centuries that all the Muktd ceremonies should be performed by the priests and to this there never has been known a single exception.

The priests as a rule, are wholly dependent for their livelihood and for the maintenance of themselves and their families on



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the fees they get from their lay brethren for the performance of their religious ceremonies. The Farvardigan days bring continuous—the Muktd ceremonies being regarded as the most sacred—and this period being the most holy amongst the Zoroastrians, the priests during these days make a far larger income than they do at any other period during the year. The fees received during the Muktd days are one of the principal sources of a priest's income during the year. The observance of the Muktd holidays helps very considerably towards the maintenance of the priestly class.

The observance of the Farvardigan days and the performance of the Muktd ceremonies have come down to the Parsis of the present day from times immemorial. That these Farvardigan days were observed in the ancient times in Persia, Ervad Jivaoji proves by Exhibit No 26. It seems that in the year A. D. 575, Emperor Justin of Rome sent an embassy to King Nushirwan of Persia, otherwise known as Khosroo the first. The Persian King asked the embassy to wait, as he was then engaged in observing the Farvardigan days.

Exhibit No 27 is an extract from the works of an Arabic author named Alberuozy, who flourished about 1000 A. D. This passage shows that the Muktd ceremonies were well known and duly performed by the Zoroastrians at and previous to the time the Arabic author wrote his "Chronology of Ancient Nations."

We have seen in the *Wadia* case that as far back as 1826 a Parsi created a Trust for the performance of Muktd ceremonies.

Besides the recitation of prayers during the performance of the various Muktd ceremonies—fruit, flowers, cooked food and *Darun* or consecrated bread and clothes, are used in the performance of some of these ceremonies. Ervad Jivaoji in his cross-examination explains the object. He says—

'The original object of using food and clothes was to prepare food and clothes and distribute them amongst the poor. Fruits and flowers are also used in the performance of the ceremonies. The idea is that the party praying says: "These are some of thy best gifts to us, O God, and we place them before you and offer them to you as our humble offerings." The food and clothes are offered to all forming the Celestial Hierarchy—the Almighty—the Amesha Spentas—the *Yazds* and the *Furohars*. The food

is not offered to the souls of the dead, but to the Fravashis and other Higher Intelligencies. Clothes are consecrated only in the Baj ceremony. Cooked food, flowers and fruits are placed before the priests performing the Baj—the Afringan and the Satoom ceremonies, and only consecrated bread (Daran) is used in the performance of the Yezashni ceremony.

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The evidence recorded in the case covers many points both of importance and interest, but it is not possible to discuss all of them within the limits of a judgment which I am afraid is already too long and I must leave the evidence to speak for itself and proceed to summarise my findings thereon. In considering the evidence, it must be remembered that the witnesses who give evidence before the Court were speaking from the scriptures written in dead languages—they were elucidating many very abstruse and elliptical passages—and they were giving the results of patient and laborious research over a vast amount of literature written in the ancient languages. The perfect unanimity prevailing amongst them lends great weight to their depositions, and there can be no doubt that their evidence is perfectly accurate and thoroughly reliable.

I find from the evidence that the Farvardigan days are the most holy days during the Zoroastrian year, and that the performance of Muktd ceremonies during the Farvardigan days is enjoined by the scriptures of the Zoroastrian religion. In para. 20 of the Farvardin Yast, Ahura Mazda commands Zoroaster in times of danger or difficulty to invoke the help of the Furohurs—who are the active helpmates of the Creator and with whose assistance he wages a continuous and successful war against the Evil Spirit.

These Furohurs come down to the earth and express a desire for the performance of certain ceremonies during the Farvardigan days. These expressions of desire on the part of the holy Furohurs have been interpreted to be commands which a faithful Zoroastrian is bound to obey. The ceremonies to be performed are indicated by the Furohurs, and the followers of the Zoroastrian religion have, from the most ancient times, been known to perform these ceremonies and to recognise the non-performance of them as a sin for which they ask forgiveness in the penitence

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tial prayers—the Patet Pashemani. In the ancient religious writings the Farvardigan days are constantly referred to. They are the Season festival—the most sacred festival in the Zoroastrian calendar. It is established by historical evidence that these ceremonies were performed in ancient Iran from the most olden times, and the Parsis after their domicile in India have continued to perform them. The performance of the Muktad ceremonies is, I find, a *religious duty* imposed upon the Zoroastrians by the proved tenets of the religion they profess.

I further find that the ceremonies themselves are acts of religious worship. They include worship, praise and adoration of the Supreme Deity and a thanksgiving for all his mercies. They contain petitions for benefits, both temporal and spiritual for all Zoroastrians—for all holy and virtuous men of all other communities—and they comprise prayers for the well being and long reign of the Sovereign, for good Government by him and for victory to him over all his enemies. The Muktad ceremonies tend most unmistakably towards the advancement of the religion promulgated by the Persian Prophet Zoroaster, and there can be no doubt, on the evidence before the Court that the performance of these ceremonies is an act of *Divine Worship* in its highest and truest sense.

I also find that the moneys paid to the priests for the performance of the Muktad ceremonies forms a good portion of their ordinary income. The priests make a higher income during the Farvardigan days than they do during any other period of the year, and the Muktad ceremonies form a sort of endowment which goes a long way to maintain the priestly classes whose existence is necessary to the community of Zoroastrians.

I also find that, according to the belief prevailing amongst the faithful followers of the Prophet Zoroaster, the performance of the Muktad ceremonies confers public benefits—benefits on the Zoroastrian community, on the peoples amongst whom they live, and upon the country which they have chosen as their home. The fundamental principle underlying this belief is faith in the efficacy of prayers addressed to the Great Creator. Every right minded human being—be he a Zoroas-

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trian Christian, Mahomedan, Hindoo or Jew, believes in the efficacy of prayers prescribed by the religion he professes and even the most indifferent and callous of them approaches the Almighty and resorts to prayers in times of sickness, difficulty or distress. Any doubt or scepticism as to efficacy of prayers addressed to the Almighty would be, to my mind, an unmistakeable sign of debased and degraded human nature.

Having found the facts as set out above the only question that now remains to be discussed is whether the Trust created by Bai Dinbai for the performance of Muktd ceremonies is valid in law. Ever since Westropp, J., delivered the judgment of the Appeal Court in *Naoroji Beramji v Rogers* <sup>(1)</sup>, wherein he said that the law uniformly applied to Parsis and their property before the legislation of 1865 was English law and that the law applicable to that particular case was English law (see pages 11 and 12 of the Report) it has been the fashion at the bar to assume, that English law applied to Parsis in all matters. In the early stages of the case I expressed some doubt as to whether English law applied to the customary religious rites and ceremonies of the Parsis and to their religious institutions. Mr Bahadburji has been at great pains to discuss before me almost every Parsi case both before and after the decision I have referred to, and the discussion has been most valuable as showing that it is by no means correct to make an unqualified statement that English law applied to Parsis in all matters as would appear from various decisions of our Court since Westropp, J. decided the case of *Naoroji v Rogers* <sup>(2)</sup> in which it was held that in those cases English law did not apply to the Parsis. See *Dhanyibhai v Navazbhai* <sup>(3)</sup> *Mithibhai v Limji Norroji Panaji* <sup>(4)</sup>, *Pesholaji v Meherbhai* <sup>(5)</sup> *Dyramji Bhimjiabhai v Jamsetji Norroji Kapadia* <sup>(6)</sup>, and *Shapurji v. Dossabhoj* <sup>(7)</sup>. However interesting or important this discussion may be on a fuller consideration of the case now before me, I have come to the conclusion that for

(1) (1867) 4 B. H. C. R. (O. C. J.) 1

(2) (1877) 2 Bom. 75

(3) (1881) 5 B. m. 506 on appeal

(1881) 6 Bom. 131

(4) (1885) 13 B. m. 30\*

(5) (1892) 19 B. m. 650

(6) (1900) 30 B. m. 255,

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present purposes it is wholly unnecessary to discuss this question here. I will proceed with the consideration of the question as to whether this is a valid Trust in law or not on the basis that English law applied to this trust. Once the nature of the ceremonies for which the trust is created is clearly understood the question of law presents no difficulty whatever.

At the outset it is as well to observe that the English law of Mortuam does not extend to British India. For thus the Privy Council decision in the case of the *Mayor of Lyons v East India Company* <sup>(1)</sup>, is a very clear authority.

In England the Statute I of Edward VI Chapter 14, known as "The Act for Chantries Collegiate" made certain existing religious trusts void and on the analogy of that Statute all trusts that followed the passing of that Statute and were analogous to those declared void by it were also held to be void. This policy of the Law is spoken of as the Doctrine of Superstitious Uses, and it is well established by a series of decisions, that this doctrine is not extended to India and has no application to Trusts relating to religion created in India. See *Advocate General v Vishwanath Almarai* <sup>(2)</sup>, *Andrews v Joalim* <sup>(3)</sup>, *Joseph Ezekiel Judah v Aaron Hye Nusseem Ezekiel Judah* <sup>(4)</sup>, and *Yeap Cheah Neo v Ong Cheng Neo* <sup>(5)</sup>.

It is quite clear that it cannot be argued that the Trust in this case is void because it falls under the Doctrine of Superstitious Uses. It is argued, however, that the Trust is bad because it offends against the Rule of Law which forbids the locking-up of property in perpetuity. The rule against perpetuity there is no doubt, is a well-established Rule of Law and is enforced in India, as in England, with equal rigour. In *Cooper v Laroche* <sup>(6)</sup> Vice-Chancellor Malins says "there is no rule of law in England more absolute than that all property, whatever may be its nature real or personal, must be absolutely vested in some person and be alienable within a life in being and twenty-one years after."

(1) (1836) 1 Moo 1 A 175

(1) (1870) 5 Ben L R (O C J) 433.

(2) (1805) 1 Bom H C R Appx 15

(2) (1875) L R 6 P C 381

(3) (1869) 2 Ben L R (O C J) 148

(3) (1881) 17 Ch D 300 at p 300

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Section 14 of the Transfer of Property Act now enacts this rule as substantive law in India. It is, however, an equally well established Rule of Law that this rule against perpetuities does not apply to Charitable Trusts. This exception to the rule is reproduced in section 17 of the Transfer of Property Act which enacts that the restrictions in sections 14, 15 and 16 shall not apply to property transferred for the benefit of the public in the *Advancement of Religion—Knowledge—Commerce—Health—Safety* or any other object beneficial to mankind. Although the Transfer of Property Act does not apply to the Trust in this case, its provisions are the reproduction of the Law as it existed before the Act was framed and passed, and are a useful guide in considering the question before me.

This exception in favour of Charitable Trust, is fully recognised in English law. In *In re Bowen*<sup>(1)</sup> Stirling, J., says —  
“Property may be given to a charity in perpetuity”

In Tudor on Charities and Mortmain, 4th Edition, at page 181, it is said —

This exception from the rule against perpetuities is well established. It is founded upon grounds of public policy, and is essential to the useful existence of Charitable Trusts.

“In order, however, to have the benefit of the exemption from the rule against perpetuities a Trust must be charitable within the meaning which the law assigns to that term.”

Tudor, at page 35 of the 4th edition, most admirably sums up the result of numerous authorities as to what is law is the meaning of Charity, in the following passage —

“The word ‘charity’ has a technical meaning in English Law, which can now only be defined by a reference to the Statute 43 Eliz. ch. 4. Its preamble enumerates ‘a list of charities so varied and comprehensive that it became the practice of the Court to refer to it as a sort of index or chart. The objects enumerated in the preamble have in fact been treated as instances, the result being that ‘those purposes are charitable which the statute enumerates or which by analogies are deemed within its spirit or intentment.’ There is, moreover, one thread which connects the whole of the objects enumerated thereby, namely, ‘the consideration whether in order to fall within the Act, the gift was, as had been said, a gift for general public use which extended to the poor as well as to the rich.’”

(1) [1893] 2 Ch. 491 at p. 494

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One of the purposes which have been held charitable within the language or spirit of this preamble is "advancement of religion"

In England on a review of the cases relating to Religious Trust, it will be found that Religious Trusts or Trusts relating to religion have been held void either as being forbidden by law or as falling under the doctrine of superstitious uses. In England there is an established Church. In India we have no established Church. By some of the older statutes churches for certain denominations of Christians were established in India and supported from the revenues of the country, but that was merely for the purpose of encouraging Christians to go out to the country and for the convenience of such Christians as came and settled either temporarily or permanently in India. In this country we have unfettered religious toleration. Every one is entitled to profess openly the religion he believes in. In the eye of the Law in India all religions are alike, and it follows therefore that each religious community professing a particular religion, and for the matter of that each member of such community, is entitled as of right to do anything that to him may seem right for the maintenance and advancement of the religion which the community or individual member thereof professes and follows.

Now, is this a Charitable Trust in the legal sense of the word Charitable? Mr. Justice Chitty in *In re Foveaux*, <sup>(1)</sup> says:—

'Charity in law is a highly technical term. The method employed by the Court is to consider the enumeration of charities in the Statute of Elizabeth bearing in mind that the enumeration is not exhaustive. Institutions whose objects are analogous to those mentioned in the statute are admitted to be charities and again institutions which are analogous to those already admitted by reported decisions are held to be charities. The pursuit of these analogies obviously requires caution and circumspection. After all the best that can be done is to consider each case as it arises, upon its own special circumstances. To be a charity there must be some public purpose—something tending to the benefit of the community. The benefit in point of local area need not extend to the public at large, a trust for the benefit of the inhabitants of a particular district will suffice.

This case is useful on other points in the present case, and therefore I think it would be convenient to notice that it was

here held that societies for the suppression and abolition of vivisection were charities within the legal definition of the term Charity. The learned Judge concluded his judgment by observing —

The purpose of these societies, whether they are right or wrong in the opinions they hold is charitable in the legal sense of the term. The intention is to benefit the community whether if they achieved their object, the community would *in fact* be benefited is a question on which I think the Court is not required to express an opinion.

Having regard, then, to the technical meaning ascribed to Charity in law I propose now to consider a few cases which throw light on the question now before the Court, showing what Religious Trusts are held to be good Charitable Trusts, and as such exempt from the application of the rule against perpetuities. It must be remembered that in England, after the Reformation, persons who differed from the established religion—such as Protestant Dissenters, Roman Catholics and Jews, were held to be obnoxious to the law, everything that was calculated to have for its object the propagation of the rights of a religion not tolerated by the law was included in the comprehensive expression “superstitious use,” and all gifts for superstitious purposes or uses were held to be contrary to the Policy of the Law and therefore illegal. Those cases, therefore, in the English Reports declaring religious trusts of various kinds to be invalid, as being trusts for superstitious uses, have no application whatever to the present case. Religious Trusts in India have a much greater analogy to Religious Trusts in Ireland since the disestablishment of the Church in that country in 1869 by 32 and 33 Victoria chapter 42. Of course, in later years in England many enabling and relieving Acts have been passed, and many disabilities against those who are not members of the established Church have now been removed, but still these relieving Acts do not repeal the whole law of Superstitious Uses, and the doctrine still holds sway—although in the present time to a limited extent even in England.

A large number of authorities on many points closely connected with the question in this case have been cited before me, but as I said before, I propose to discuss only a very few

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of them, with a view to see what trusts in connection with religion, religious observances, and religious and other beliefs have been held valid in England and Ireland.

In *Powerscourt v. Powerscourt*<sup>(1)</sup>, a Testator by his will devised £ 2,000 to Trustees in trust to lay out the sum at their discretion until his son came of age, "in the Service of my Lord and Master, and I trust Redeemer."

This bequest was held to be a good and valid bequest to charity and was ordered by the Court to be carried into effect. This is an Irish case, but in 1895 in the case of *Farguher v. Darling*<sup>(2)</sup>, Mr. Justice Stirling refers to this case with approval and follows it. There the Testatrix bequeathed the residue of her property "to the poor and to the service of God." Mr. Justice Stirling in giving judgment says:—

"I have to construe this will according to the ordinary meaning of the language as used by English testators, and I think that when 'the service of God' is spoken of as it is in this will, no one so construing the expression would hesitate to say that service in a religious sense was intended."

The learned Judge then quotes a passage from the judgment of Lord Manners, L. C., in *Powerscourt v. Powerscourt*<sup>(3)</sup> and concludes his judgment in these words:—

"It has not been disputed before me that a bequest for religious purposes is a good charitable bequest, and, on the authority of the case to which I have just referred, as well as upon my own view of the true construction of the will, I hold that the residuary estate is well given to charitable purposes."

In *Webb v. Oldfield*<sup>(4)</sup>, a Testator devised a portion of a perpetual yearly rent to two Vegetarian Societies in equal moieties for the use of the said societies, to be paid to them for ever.

The Master of the Rolls held that the objects of those Societies might be fairly described as charitable within the principle of decided cases, and that there was a valid gift to the two societies in equal moieties, and the Court of Appeal affirmed the decision.

(1) (1824) 1 Melloy 616.

(2) [1895] 1 Ch. 50.

(3) [1895] 1 I. R. 431.

In *Straus v Goldsmid* <sup>(1)</sup>, the Court in England had before it the will of a Testator professing the Jewish religion. He bequeathed a third of the residuo of his estate to the Rulers and Wardens of the Great Synagogue in the City of London, with directions to them to utilise the interest and dividends of the said third of the residuo every year on the eve of Passover in distributing, at least amongst 10 worthy men to purchase meat and wine fit for the service of the two nights of Passover. The Vice Chancellor held that the bequest being intended to enable persons professing the Jewish religion to observe its rites, was good, and the Trust was upheld.

In *Attorney General v Stephen* <sup>(2)</sup> a bequest of the residuo of personal estate for the 'increase and improvement of Christian knowledge and promoting religion,' was held by Lord Eldon to be good charitable bequest, as it had for its object a General charitable purpose of promoting Christian knowledge.

In a later case, *Baker v Sutton* <sup>(3)</sup>, the Master of the Rolls, Lord Langdale, refers to this case and follows it. In this case the testator made a bequest of the residuo of his personal estate for 'such religious and charitable institutions and purposes within the Kingdom of England as in the opinion of the testator's trustees should be deemed fit and proper.' The Master of the Rolls, in the course of his judgment, observes (at p 283) —

'All the cases with one exception go to support the proposition that a religious purpose is a charitable purpose. In the *Attorney General v Stephen* <sup>(4)</sup> Lord Eldon assumes throughout his Judgment that a religious purpose was a charitable purpose. I am of opinion that the bequest in the present case for such religious and charitable institutions and purposes as the trustees should think fit is a good charitable gift.

*Townsend v Cars* <sup>(5)</sup> is another case in which a Testatrix bequeathed a legacy to Trustees 'upon trust to pay, divide or dispose thereof, unto or for the benefit or advancement of such societies, subscriptions or purposes, having regard to the Glory of God in the spiritual welfare of His creatures, as they shall in their discretion see fit.' This gift was construed to be a gift

(1) (183) 55 n. 614.

(2) (1804) 10 Ves. Jun. 22.

(3) (1830) 1 Keen 274.

(4) (1843) 3 Hare 27.

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for religious purposes, and as such valid and restricted to such purposes. The Vice-Chancellor refers in his judgment to the case of *Baker v. Sutton*<sup>(1)</sup>, which I have discussed immediately above, and says:—

“If this is a bequest for religious purposes, I think I am bound to hold it a charity within the decided cases. The cases referred to in *Baker v. Sutton* (1), and that case itself, are sufficient authorities on this point.”

Another very instructive case is that of the *Attorney-General v. Laws*<sup>(2)</sup>. In that case the testatrix by her will gave directions to her executors “to pay unto Messrs. Drummonds, Bankers, a clear yearly sum of £100 for the sole use and benefit of any of the ministers and members of the churches now forming upon the apostolical doctrines brought forward originally by the late Edward Irving, who may be persecuted, aggrieved, or in poverty for preaching or upholding those doctrines, or half the sum may be appropriated for the benefit of the church founded by the late Edward Irving in Newman-Street.”

This bequest was held by the Court to be a valid charitable bequest of a *perpetual* annuity. The Vice-Chancellor, at the close of counsel's argument, observed that the bequest was not the less a charitable bequest from the fact that it was given *for the benefit of a limited class of persons*—that it was not the number of the objects which made the distinction between a public and private charity—that it was not the less a charity because it was confined to those members of a particular class of persons who were subject to certain grievances and not to the class at large.

*In Re Michel's Trust*<sup>(3)</sup> is a case of great use in considering the question now before the Court. The testator, Abraham Michel a Jew, by his will bequeathed so much money as would produce £10 a year upon trust to pay the said sum of £10 every year to three persons to learn in their Beth Hammadrass or College two hours daily—and on every anniversary of the Testator's death to say the prayer called in Hebrew “*Candish*,” which is a

(1) (1836) 1 Keen 224.

(2) (1849) 3 Hare 32.

(3) (1860) 28 Beav. 39

short Hebrew prayer in praise of God and expressive of resignation to His will. Many of the disabilities relating to Jews residing in England were removed by 9 & 10 Vic c 59, s 2, which provided that "from and after the commencement of this Act Her Majesty's subjects, professing the Jewish religion in respect to their schools—places for religious worship, education and charitable purposes, and the property held therewith shall be subject to the same laws as Her Majesty's Protestant subjects dissenting from the Church of England are subject to, and not further or otherwise." Although the testator died in 1821 the case does not seem to have come before the Court till 1855. The Master of the Rolls, Sir John Romilly, held that the statute had a retrospective effect and applied to this will. The bequest was sought to be defeated by the residuary legatee on the ground, first, that 'the gift was void as a superstitious use, as an anniversary or obit, and was similar to praying for the testator's soul', and, secondly, on the ground that the gift was invalid as 'tending to a perpetuity'. In delivering judgment, the Master of the Rolls made the following very important observations —

'I have no doubt of the validity of this bequest and it is therefore the duty of this Court to carry it into effect. I see nothing in the bequest which is superstitious. If it be part of the forms of their religion that prayers should be said for the benefit of the souls of deceased persons, it would be difficult to say that as a religious ceremony practised by a dissenting class of religionists, it could be deemed superstitious in the legal sense in which these words were used prior to the passing of the statutes in question. I think that this is a valid gift for the benefit of a Jewish clergy.'

I will next consider the very peculiar case of *Thornton v. Howe*<sup>(1)</sup>. In this case the Testatrix Ann Essam bequeathed the residue of her estate both real and personal, in trust "for printing, publishing and propagating the sacred writings of Joanna Southcote." The Heiress at-Law of the Testatrix filed a bill for a Declaration that the trust was void in law. She charged that the writings of Joanna Southcote . . . purport to declare, maintain or reveal that she was with child by the Holy Ghost and that a second Messiah was about to be born of her body, and that her

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(1) (1867) 31 L. J. 116

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writings were of a blasphemous and profane character, and that the trust was for the propagation of doctrines subversive of or contrary to the Christian religion. The Master of the Rolls, Sir John Romilly, before giving Judgment, himself studied the works of Joanna Southcote. He came to the conclusion that she was a foolish ignorant woman, of an enthusiastic turn of mind. He said he had found much in her writings that in his opinion was very foolish, but there was nothing in them that was likely to make persons who read them immoral or irreligious, and he declined to declare the devise of the testatrix as invalid by reason of the tendency of the writings of Johanna Southcote. In the course of his Judgment the Master of the Rolls has made some very weighty observations, which are of considerable importance in this case. He says (at p 19) —

"I am of opinion, that if a bequest of money be made for the purpose of printing and circulating works of a religious tendency, or for the purpose of extending the knowledge of the Christian religion, that this is a charitable bequest. The Court of Chancery makes no distinction between one sort of religion and another. They are equally bequests which are included in the general term of charitable bequests. Neither does the Court, in this respect, make any distinction between one sect and another. It may be, that the tenets of a particular sect inculcate doctrines adverse to the very foundations of all religion, and that they are subversive of all morality. In such a case if it should arise, the Court will not assist the execution of the bequest, but will declare it to be void . . . But if the tendency were not immoral, and *although this Court might consider the opinions sought to be propagated foolish or even devoid of foundation*, it would not, on that account, declare it void, or take it out of the class of legacies which are included in the general terms charitable bequests."

*Lord Macnaghten in the great Judgment he delivered in the House of Lords in the case of the Commissioners for special purposes of Income Tax v. Pemsel*<sup>(1)</sup>, says —

'That according to the law of England a technical meaning is attached to the word 'charity' and to the word 'charitable' in such expressions as 'charitable uses' 'charitable trusts' or 'charitable purposes, cannot, I think, be denied. The Court of Chancery has always regarded with peculiar favour those trusts of a public nature which, according to the doctrine of the Court derived from the piety of early times, are considered to be charitable. Charitable uses or Trusts form a distinct head of equity. Their distinctive position

is made the more conspicuous by the circumstance that owing to their nature they are not obnoxious to the rule against perpetuities, while a gift in perpetuity not being a charity is void. In Ireland though neither the Statute of Elizabeth nor the so called Statute of Mortmain extended to that country, the legal and technical meaning of the term 'charity' is precisely the same as it is in England.'

His Lordship then goes on to enunciate the four principal heads under which he divides charities. He says —

'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.'

I have merely referred to the cases cited above and culled out passages from the various judgments and set them out without any comment of my own, firstly, because I am oppressed by a feeling that this judgment is already exceeding the length to which an ordinary judgment should go; and secondly, because it seems to me that the importance and the applicability of these cases to the present one are so obvious that they require no comment from me.

There is one other case of paramount importance but, before I refer to it, I think it would be convenient here shortly to notice the cases on which the plaintiff's counsel relies in support of his contentions against the validity of the Trust in this case.

The case on which Mr. Tarachand chiefly relies is that of *Weet v. Shuttleworth*<sup>(1)</sup>. In this case the testatrix directed several sums of money to be paid to several Roman Catholic priests and chapels and desired that they might be paid as soon as possible after her death so that she might have the benefit of their prayers and Masses. These bequests formed one branch of the case. The other branch related to a bequest of the residue of her property to Trustees upon trust to pay £10 each to the ministers of certain specified Roman Catholic chapels for the benefit of their prayers for the repose of her soul and that of her deceased husband, and the remainder was directed to be appropriated in such a way, as the trustees might judge best, as would be calculated to promote the knowledge of the Catholic Christian

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religion amongst the poor and ignorant inhabitants of two towns in the County of York mentioned by the testatrix. These bequests were attacked on two grounds. It was contended that the legacies to the priests and chapels were void as being for superstitious uses, and it was argued that the gift of the residue was also void in law as being for the express purpose of promoting the Roman Catholic religion. As there has been a difference of opinion between counsel as to the precise grounds on which this case was decided, I cannot do better than give the grounds of the decision in the words of the Master of the Rolls in the Judgment itself. He says (at p. 697) —

*There can be no doubt that the sums given to the priests and chapels were not intended for the benefit of the priests personally or for the support of the chapels for general purposes but that they were given, as expressed in the letter, for the benefit of their prayers for the repose of the testatrix's soul and that of her deceased husband, and the question is, whether such legacies can be supported*

‘The legacies in question, therefore, are not within the terms of the statute of Edward VI, but that statute has been considered as establishing the illegality of certain gifts and, amongst others, the giving legacies to priests to pray for the soul of the donor has, in many cases collected in *Dule*, been decided to be *within the Superstitious Uses* intended to be suppressed by that statute. I am therefore of opinion that these legacies to priests and chapels are void.

These words can leave no room for doubt that the legacies in question forming the first branch of the case were held to be void as being gifts for superstitious uses “although not coming within the statute relating to superstitious uses.” See *Yeap Cheah Neo v Ong Oheng Neo*<sup>(1)</sup>. The question involved in the second branch of the case, relating to the gift of the residue, involved the consideration of the provision of Statutes 2 & 3 Will. IV, c. 115. The Master of the Rolls, after discussing the provisions of the statute and certain decided cases, said that they left no doubt in his mind of the validity in law of the gift of the residue. How the decision of this case, holding the gifts to priests and chapels void because they were construed to be gifts for superstitious uses, can help the plaintiff in this case, I fail to understand. As shown above, the doctrine of superstitious uses

has no applicability whatever to religious trusts in this country, and I must confess I see nothing in this case to help the plaintiff in his contentions. If anything, this case is indirectly of use to the contentions of the defendants, because, in the first place the bequest of the residue for promoting the Roman Catholic religion is held valid, and the words of the Master of the Rolls lead one to believe that if the gifts involved in the first branch were "intended for the benefit of the priests personally or for the support of the chapels for general purposes," the result might have been different. I can understand the plaintiff's counsel's reasoning if he merely wishes to make use of the case as showing that a gift for prayers for the repose of the soul of the donor or those connected with the donor is bad in law. It is not necessary for the purposes of the case to consider that question at all. Nobody has argued before me that gifts for the purpose of saying prayers for the repose of the souls of the dead are good gifts in law. The whole force of the defendant's fight is directed towards proving that the present Trust is *not* a trust for the purpose of saying prayers for the repose of the souls of the dead, and I think they have succeeded in proving that beyond a shadow of doubt.

The next case on which Mr. Tarachand relied was that of *Heath v. Chapman*<sup>(1)</sup>. In this case there were trusts declared for certain Roman Catholic chapels, for saying Masses and requiems for the souls of donor and for other souls, and for the souls of the "poor dead" and for other pious purposes. It was held that gifts for Masses, etc., for the dead were superstitious and void—that the pious uses could not—as religious uses—be separated from the others and were therefore also bad, and that the words pious uses could not be construed charitable uses—consequently the property given to these uses went to the Residuary Legatee of the donor. *West v. Shuttleworth*<sup>(2)</sup> was in this case followed. This case again does not help the plaintiff in the least, for the same reasons as apply to *West v. Shuttleworth*<sup>(3)</sup>.

The case of *West v. Shuttleworth*<sup>(4)</sup> is often cited and is referred to in many subsequent cases, and before leaving the consider-

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(1) (1834) 2 Drew 417.

(2) (1835) 2 My &amp; K. C. 4.



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ation of the case and passing on, it would be interesting to note that in *In re Blundell's Trusts*,<sup>(1)</sup> twenty-two years after its decision, Sir John Romilly, Master of the Rolls, expresses doubts as to the soundness of that decision in the following words :—

‘ I expressed my doubt in the case referred to as to whether gifts for religious ceremonies practised by a dissenting class of religionists might not be permitted if not opposed to public morality, but I think the decided cases too strong and that the House of Lords alone can alter the settled law. It is clear that I must act on *West v Shuttleworth*<sup>(2)</sup>, which I cannot overrule.’

The next case relied on by Mr Thrachand is that of *Colgan v The Administrator-General of Madras*.<sup>(3)</sup> This was a case in which the Court had to consider the disposition made by an Armenian lady by her will, and the Appeal Court in Madras held that a bequest for perpetual Masses for the benefit of the soul of the testatrix and for souls in purgatory was void as infringing the rule against perpetuities. This case was decided in 1892. The same remarks that I have made with reference to *West v. Shuttleworth*<sup>(2)</sup> and *Heath v. Chapman*<sup>(4)</sup> apply to this case. This case is also open to the further remark that after the decision in 1906 of the case of *O'Hanlon v. Logue*<sup>(5)</sup> by the Court of highest jurisdiction in Ireland—to which case I will presently refer—it seems to me now to be quite certain that the decision in this case that bequests in perpetuity for the celebration of Masses are void is not good law, and no Court in India will or can follow the case or regard it as a correct decision on this subject.

The last case on which the plaintiff's Counsel relies and which is his sheet anchor, is the case of *Yeap Cheah Neo v. Ong Cheng Neo*.<sup>(6)</sup> As the case is treated by Mr Justice Jordine in *Limji Narmoji Banaji v. Bapuji Ruttonji Irubwalla*<sup>(7)</sup> as an authority in “approaching the question of law,” I think it is desirable to consider with care what bearing this decision of their Lordships of the Privy Council has on a

(1) (1861) 30 Bear 360 at p. 362

(2) (1870) 2 My & K 651

(3) (1892) 15 Mal 474

(4) (1844) 9 Drew 417

(5) [1906] 1 I R 247.

(6) (1870) 1 R G P C 351

(7) (1887) 11 Borr. 411

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trust created by a Parsi in India. The testatrix whose will was under consideration was a Chinese lady who had taken up her residence in Penang in the Straits Settlement. This tract of country was ceded by a Native Prince in or about 1807 to the East India Company. It was then wholly uninhabited. The Company built a fort and a town, and a number of Chinese, Malays and Indians settled there. The place had no original or indigenous peoples of its own and consequently there were no customs or usages which could be said to have been in vogue amongst the people of the land. Amongst the points decided by the Privy Council in the case, those that are supposed to affect the question in the present case are two, namely —

(1) That a devise of two plantations in which the graves of the family were placed, to be reserved as a family burying-place and not to be mortgaged or sold was void as a devise in perpetuity and (2) that a direction that a house for performing religious ceremonies to the testatrix and her late husband be erected was void, as being a devise in perpetuity which was not for a charitable use.

Mr Justice Jarniac, referring to *Yeap Cheah Neo v Ong Cheng Neo*<sup>(1)</sup>, says —

‘ Their Lordships’ observation appears applicable to Parsis in Bombay. ‘ In this respect a pious Chinese is in precisely the same condition as a Roman Catholic who has devised property for Masses for the dead or as the Christian of any Church who may have devised property to maintain the tombs of deceased relatives.

A careful perusal of the paragraph at page 396 of the report from which this sentence is picked out, shows conclusively that what their Lordships said was that, according to English Law prevailing in England, the gifts they were considering would be analogous to gifts for Masses or for the upkeep of tombs, and such gifts being gifts merely for pious uses would be void as being gifts for Superstitious Uses. That this is without doubt so will be seen by the observations of their Lordships which immediately precede the sentence in question. They say —

‘ The performance of these ceremonies is considered by the Chinese to be a pious duty. The dedication of this Sow Chong House bears a close analogy to gifts to priests for Masses for the dead. Such a gift by a Roman

(1) (1875) L. R. 6 P. C. 331

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Catholic widow of property for Masses for the repose of her deceased husband's soul and her own, was held in *West v. Shuttleworth*<sup>(1)</sup> not to be a charitable use and although not coming within the statute relating to superstitious use, to be void.

The concluding sentence of their Lordships in this paragraph is—

"All are alike forbidden on grounds of public policy to dedicate lands in perpetuity to such objects.

These and similar gifts, although not falling strictly within the letter of the statute of Edward VI, have nevertheless been held void as in *West v. Shuttleworth*<sup>(2)</sup>, as being within the spirit and intendment of the statute, and being analogous to those mentioned in the statute, fall within the purview of the Doctrine of Superstitious Uses, which took its origin from the statute and became applicable to certain trusts for pious uses on grounds of public policy. This doctrine has no applicability whatever to trusts in India, and therefore, with great deference to the learned Judge, I venture to say that their Lordships' observation in *Teap Cheah Neo v. Ong Cheng Neo*<sup>(3)</sup> quoted by him, has no applicability to Parsis in Bombay or to the trusts created by them.

That it was possible that their Lordships' decision might have been different if they had evidence before them proving the usage and customs prevailing amongst the Chinese community at Penang, appears from the observations in the judgment at page 395, where they say —

"The devise of the two plantations is plainly a devise in perpetuity. The only question is whether it can be regarded as a gift for a charitable use. The weight of authority is against a devise of this nature being so held in the case of an English will, and the only point therefore, requiring consideration can be whether there is anything in Chinese usages with regard to the burial of their dead and in the arrangements for that purpose at Penang which would render such an appropriation of land beneficial or useful to the public. It is to be observed that the extent of the plantations nowhere appears, and it may be they contain more land than would be required for the purpose of a family burial ground. In the absence of any information respecting usages of the land adverted to and of the extent of these plantations their Lordships feel unable to say that the decree on this point is wrong.

(1) (1830) 2 N. & A. 681.

(2) (1875) L. R. 10 P. C. 381.

Side by side with *Yeap Cheah Neo v. Ong Cheng Neo*<sup>(1)</sup>, Mr Justice Jardine refers to *Fatmabibi v. The Advocate-General of Bombay*<sup>(2)</sup>. In his judgment in that case Mr Justice West refers to *Yeap Cheah Neo v. Ong Cheng Neo*<sup>(3)</sup>, and it is most instructive to notice his observations as to that case and its applicability to trusts in India. At page 50 of the report his Lordship observes —

"As to the ultimate trust for constructing wells and aiding marriages and pilgrimages the case of *Neo v. Neo* shows that the rule against perpetuities extends to a Colony where the English Law is enforced *only so far as that law is adapted to the circumstances of the community* because it is regarded as having its foundation in principles of general application. But it is subject to exception in the case of 'Charities' liberally construed as objects useful and beneficial to the community. But useful and beneficial in what sense? The Courts have to pronounce whether any particular object of a bounty falls within the definition, but they must in general apply the standard of *Customary Law and common opinion amongst the community to which the parties interested belong*

The same principle enunciated by Mr Justice West in this case found expression in the much earlier case of *Kojaks and Memons*<sup>(4)</sup>, and this principle ought, I think always to be kept in mind by the Courts in India dealing with trusts and settlements created by those communities in India, who are not covered by the exception created by statute in favour of Mahomedans and Gentoos, and to whom English law is promiscuously applied.

Before finally leaving *Limbwalla's case*<sup>(5)</sup> I ought to notice another passage in the judgment, where Mr. Justice Jardine says —

"The other object, viz, the acquiring by a few private persons of benefits through the protection of the Feroohs seems to me to resemble a gift to a private company and therefore not a gift to a charitable use."

The learned Judge relies on the cases of *Cocks v. Manners*<sup>(6)</sup>, and the *Attorney-General v. Haberdashers' Company*<sup>(7)</sup> as authorities for the above passage. In the first of these cases the Court had to deal with gifts to two chapels, a convent and a

(1) (1875) L. R. 6 P. O. 351.

(2) (1881) 6 Bom. 4<sup>o</sup>.

(3) (1817) P. O. C. 110.

(4) 1537 11 Bom. 411.

(5) (1871) L. R. 12 L. J. 574.

(6) (1831) 1 M. & K. 40.

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In the course of an elaborate judgment delivered by him in *Attorney-General v. Delaney*<sup>(1)</sup>, Chief Baron Palles held that trusts for the celebration of Masses in private were invalid, as not being charitable, but expressed a very strong opinion that if the trust had been for the celebration of Masses in public, the trust would have been a good and valid charitable trust in the eye of the law. His colleagues on the Bench—Barons Fitzgerald, Dowse and Deasy—were not prepared to go to the length the Chief Baron had gone, and guarded themselves by declaring that they must not be taken as holding that the opinion expressed

by the Chief Baron was the judgment of the Court. The Court in this case contented itself by saying that they left the question as to whether a trust for Masses directed to be celebrated in public would or would not be a valid charitable trust, open, to be decided whenever it may arise. Twenty-two years afterwards it did arise in the case of the *Attorney-General v Hall*<sup>(1)</sup> wherein a Bench consisting of Lord Ashbourne, the Lord Chancellor of Ireland, and Lords Justices FitzGibbon, Barry and Walker, held that "a bequest to a Roman Catholic priest, to be applied for Masses to be celebrated publicly in a specified Roman Catholic Church in Ireland for the repose of the testator's soul, is a valid charitable bequest."

Thus what the Chief Baron Palles had expressed as his opinion was pronounced to be a judicial finding nearly a quarter of a century afterwards.

But by far the most remarkable advance in the law was made in the great case of *O'Hanlon v. Logue*<sup>(2)</sup>. By a curious coincidence it happens that Chief Baron Palles was a member of the Bench which decided this case—the other Members being Lord Chancellor Walker and Lords Justices FitzGibbon and Holmes. In the whole discussion before me, and amongst the numerous authorities cited before me, I consider that this case is by far the most important and has the closest bearing on the question I am now considering. The testatrix in the case devised and bequeathed all her property to trustees upon the trusts, the ultimate trust being "to sell and invest the proceeds, and to pay the income thereof from time to time to the Roman Catholic Primate of all Ireland for the time being, to be applied for the celebration of Masses for the repose of the soul of my late husband, my children and myself." The *Attorney-General v. Delaney*<sup>(3)</sup>, thirty one years after *O'Hanlon v. Logue* was held—

"That a bequest for Masses in perpetuity is a valid charitable bequest, and there is a direction that the Masses should be celebrated in the parish church of the testatrix."

(1) [1807] 2 I. R. 406.

(2) (1834) 1 R. 10 C. L. 12.

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What are Masses is fully explained in *Attorney-General v. Delaney*<sup>(1)</sup>, and some extracts from the prayers recited during the celebration of the Masses are given in that case. Though commonly these prayers are supposed to be recited for the repose of the souls of the dead, a perusal of them will show that, very much like the prayer said by the Parsi priests during the Mukhtad ceremonies, they are prayers involving a sacrifice to God, invoking blessing on mankind, and including worship of the Creator. They are prayers offered to God to propitiate His anger, to return thanks for His benefits and to bring down His blessings upon the whole world. The celebration of the Masses is, like the celebration of the Mukhtad ceremonies, an Act of Divine Worship, and the performance of Masses helps to maintain the priestly class, the moneys paid to them for Masses forming a portion of their ordinary income and means of livelihood.

No apology is necessary for transcribing here certain passages from the judgments delivered in this case; first, because those passages have the closest and the most important bearing on the present case; and secondly, because they contain sentiments and thoughts the most ennobling that humanity could utter. The Lord Chancellor, in the course of his judgment, says (at p. 259).—

"There are some legal propositions germane to the case for which it would be mere pedantry to cite authority—(a) That in speaking of what is 'charitable' we use the word in the artificial sense, which is derived from the statute 43 Eliz. c. 4, (b) that included amongst charitable objects is one which, according to the ideas of the giver, is for the public benefit; (c) that a gift for the advancement of 'religion' is a charitable gift and that in applying this principle, the Court does not enter into an inquiry as to the truth or soundness of any religious doctrine, provided it be not contrary to morals, or contain nothing contrary to law. All religions are equal in the eye of the Law. . . . Whether the subject of the gift be religious or for an educational purpose, the Court does not set up its own opinion. It is enough that it is not illegal, or contrary to public policy, or opposed to the settled principles of morality."

Chief Baron Pallas, in the course of his judgment, after reviewing all the English and Irish authorities, goes on to say (at p. 270):—

"The acts of worship of a Church are admitted, by all theistic religions, to tend to discharge, to some extent, the debt due to God by the general body of the faithful, and to bring down upon them temporal and spiritual benefits. But these acts must be performed by ministers of that Church, and thus the gifts are in a two fold manner charitable—first, and principally, by reason of the piety which is the essence of the gift to God, the gift which is to be applied to His Divine Worship, and secondly, by the mode in which it is to be so applied, viz, in the maintenance and support of the ministers by whom the acts of worship are to be performed

That there is a most striking resemblance between the ceremonies performed and prayers recited during the Muktd days and the performance of Masses will appear from the following passage in the Chief Baron's judgment (at p. 274) —

The Service of Mass "is an act of divine worship of the Church, an offering of praise, adoration and thanksgiving, involving a petition for benefits temporal and spiritual, for all the faithful alive, whether present or absent "

This is exactly what the witnesses have said with regard to the Muktd ceremonies, with perhaps this addition, that the prayers recited by the Zoroastrian priests are more altruistic, and the petition for benefits is not confined to the faithful but is universal

The Chief Baron goes on to say (at p. 275) —

"The existence of a divine service is essential to all religions and equally essential is the existence of a privileged class a priesthood or a class of ministers, by whom that divine service shall be celebrated, on behalf of the Church. The divine service of the particular religion must be defined by the doctrines of its own religion. Without those doctrines it cannot exist as a divine service. Without a knowledge of those doctrines, the spiritual effect of the service cannot be understood. Consequently the effect of the divine service cannot be known, otherwise than from the doctrines of its religion, coupled with a hypothetical admission of their truth. But the advancement of any theistic religion is charitable, and such advancement may result from an increased number of the celebrations of its divine service. Therefore the charitable nature of a divine service must (when the religion is not an established one) depend upon the character of the act, not objectively, but according to the doctrines of the religion in question

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In the course of the argument before me it has been strenuously contended that the performance of the Mukhtad ceremonies results in no public benefit; that it merely has a tendency to put money in the pockets of the priest, and that the recitation of the prayers and the compliance with all the solemn rituals accompanying the performance of the ceremonies have no real efficacy and do not result in any benefit of a public nature. This identical question is dealt with by the Chief Baron, and the contention is refuted in the most effectual manner. He says (at p. 276):—

"But when it (the Law) knows these doctrines, although it knows that, according to them, such an act has the spiritual efficacy alleged, it cannot know it *objectively* and as a fact, unless it also knows that the doctrines in question are true. But it never can know that they are objectively true, unless it first determines that the religion in question is a true religion. This it cannot do. It not only has no means of doing so, but it is contrary to the principle that all religions are now equal in the law. It follows that there must be one of two results either—(1) the Law must cease to admit that any divine worship can have spiritual efficacy to produce a public benefit; or, (2) it must admit the sufficiency of spiritual efficacy, but ascertain it according to the doctrines of the religion whose act of worship it is.

"The first alternative is an *impossible* one. The law, by rendering all religions equal in its sight, did not intend to deny that which is the basis of, at least, all Christian religions, that acts of divine worship have a spiritual efficacy. To do so would, virtually, be to refuse to recognise the essence of all religion.

"The other result must, therefore, necessarily ensue. It must ascertain the spiritual efficacy according to the doctrines of the religion in question, and if, according to those doctrines, that divine service does result in public benefit, either temporal or spiritual, the act must, in law, be deemed charitable."

Now, in this case it is proved beyond doubt that according to the doctrines of the Zoroastrian religion the performance of the Mukhtad ceremonies is enjoined—that it is the duty of all Zoroastrians to have these ceremonies performed. The Court has before it the knowledge what ceremonies are obligatory and what are optional—the Court has before it the prayers ordained to be recited during the ceremonies—the Court has before it the evidence of witnesses proving that these ceremonies have to be performed by priests who are paid for doing so and such honoraria as they receive form a portion of their income, and are their

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ordinary means of livelihood. The Court is then in a position to judge how far the witnesses are right, when they say the performance of such religious ceremonies amounts to an Act of Divine worship which is hebeved by the community to bring down to the world both temporal and spiritual benefits—not only on those that perform the ceremony—but on the whole community—on their country and their Sovereign—on all mankind—on the Universe. If this is the belief of the community—and it is proved undoubtedly to be the belief of the Zoroastrian community—a secular judge is bound to accept that belief—it is not for him to sit in judgment on that belief—he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be in advancement of his religion and for the welfare of his community or of mankind, and say to him, 'You shall not do it.' This Court can only judge of the efficacy of such gifts in procuring public benefits by the belief of the donor and of the community to which he belongs—the belief of those who profess the religion—the ordained ceremonies of which the donor desires performance.

Lord Justice FitzGibbon, speaking on the point, says (at p. 279) —

'In determining whether the performance of any particular rite promotes any particular religion, and benefits the members of the Church or denomination, or body, who profess it, the secular Court must act upon evidence of the belief of the members of the community concerned. It can have no other guide upon that subject.

'The exclusiveness, the vagueness or the self-sufficiency of principles religiously held by particular sects whether they rest on dogma or on conscience cannot exclude those who profess any lawful creed from the benefits of charitable gifts.

It would be strange indeed if it qualified for the promotion of total abstinence or even vegetarianism for the maintenance of a place of worship or of a minister for a small congregation of peculiar people for the dissemination of the works of Joanna Southcott or for the prevention of cruelty to animals should be held as they have been, to be charitable objects if a provision by a Roman Catholic for Roman Catholics of the celebration of the Mass, more especially in Ireland where 'Superstitions and Usages' are not *malæ prohibitæ* were to be excluded from this category.

To this I would add that it would be stranger still in a country like India, where superstition abounds where each community is

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by the Crown left free to profess what religion it pleases—from where the doctrine of superstitious uses is rigorously excluded, where trusts of lands and moneys in perpetuity for idols and similar trusts are recognised and enforced by the Courts—that a Parsi professing the Zoroastrian religion should be precluded from making a gift for the performance of religious rites and ceremonies which he is enjoined by the religion he professes to perform, and the non-performance of which, according to his religion, is a great sin. Why should he be precluded from setting apart a portion of his property and devoting it to a purpose which he believes would result in benefits to himself, his family and his community—in promoting the religion he professes and saving his descendants from committing a sin should circumstances place them in a position of inability to perform these ceremonies for want of means. On this point in the same case Lord Justice FitzGibbon, a Protestant Judge, observes (at p 280) —

‘Speaking with all reverence of a faith which I do not hold touching the very ‘Mystery of Godliness’ I could not impute to any individual professing the Roman Catholic religion that he regarded a gift of money for Masses as a means of securing from such a Sacrifice a private and exclusive benefit for himself alone, as being much less than blasphemy and, as I understand the proved doctrine of the Church it would certainly be heresy. But the hope or belief that in some shape or form here or hereafter, a man’s good works will follow him—an ingredient of selfishness in that sense—enters into almost every act of charity and if the act is done in the belief that it will benefit others for example in the belief that he that gives to the poor lends to the Lord, it can be none the less charitable because the giver looks for his reward in heaven

Lord Justice FitzGibbon ends his judgment by saying —

‘The fruition of faith ‘the evidence of things not seen,’ is hidden from humanity. It is not within the power of any earthly tribunal to entertain the question whether these propositions are true. But it is for us to decide that belief in their truth is part of the faith of the members of the Church which has laid them down

Speaking of the belief of the Roman Catholics in the efficacy of the performance of Masses being benefits to the community, Lord Justice Holmes says (at p 286) —

“A temporal Court in Ireland, having no authority to decide for itself whether it was true or not must take as its guide the belief of the Church of which the testatrix is a member

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I would like here to say that so far as I am concerned, I have scarcely ever come across a case in a Court in another country bearing closer resemblance to facts and contentions of a case before our Courts than the case of *O'Hanlon v. Logue*<sup>(1)</sup> bears to the present case. It must be remembered that it is decided by the tribunal having the highest jurisdiction in a country in which religious matters bear remarkable analogy to this country—Ireland like India having no established Church, no State religion, and where the doctrine of superstitious uses has no application. It is decided as recently as 1906, its pronouncements are clear and emphatic, there is no element of doubt or a note of uncertainty in the judgments pronounced, every case of importance on the subject, ancient or modern, is carefully considered and the question before the Court finally and definitely settled. Judgments such as those pronounced in this case must command the respectful attention of other Courts deciding similar questions. This case alone is sufficient to set at rest all doubts and remove all difficulties in the decision of this case, and enables me to answer the question before me—

‘Whether the Trust declared in respect of the Government Promissory Notes for 15 000 Rupees mentioned in the plaint are valid

in the affirmative with considerable confidence. I hold that Trusts and bequests of lands or money—for the purpose of devoting the incomes thereof in perpetuity for the purpose of performing Mukhad, Baj, Yajushni and other Hindu ceremonies are valid ‘charitable’ bequests, and are such exempt from the application of the Rule of Law forbidding perpetuities.

The only other question to be considered is as to costs. The plaintiff is a member of the Bar and as such he has conducted his own case. At the end of the case he intimated to me that he does not propose to saddle the trust funds with his own fees. This is generous of him. I ought here to say that throughout the whole case the attitude of the plaintiff was most correct. He did not come to the Court for the purpose of dividing the Trust estate. His share in the funds would have been so small that it would not have been worth his while troubling about it if his

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motive had been merely to share in the division of the funds. On the very first day the matter came on before me, he expressed his perfect willingness to have the matter decided against him, which, of course I had no power to do in the face of the decision in 11 Bombay and in the absence of any materials before me. He came to Court for directions as the original Trustees had all died, the ceremonies had remained unperformed in the previous year, and the income of the funds remained unutilized. His single-handed but vigorous fight has saved the case from being stigmatised as a one sided show or a happy-family arrangement. He is entitled to his costs, whether he takes them or not it is for him to decide. Had the other parties, excluding from this expression, of course, the Advocate General—followed the plaintiff's example as I had hoped they would and offered to bear their own costs, the plaintiff's unselfish offer would have been most useful. When I gave expression to my inclination to give priority to the Advocate-General for his costs a most acrimonious discussion ensued. Mr. Bahadurji vigorously resented the suggestion, and argued—I now find correctly—that there is no precedent for such an order and that it would be a most unusual order to make. Mr. Kanga claimed priority for the costs of his clients and argued that his clients were Trustees, and as such were entitled to have their costs paid out of the funds taxed as between attorney and client. He claimed a lien on the funds for his costs. Mr. Kanga's clients are not Trustees. They are merely the executor and executrix of the will of one of the original Trustees and are in exactly the same position as the plaintiff who is Administrator of the estate of another original Trustee, and the tenth and eleventh defendants, who are executors of the will of the third original Trustee. That his clients are in possession of the Trust property is merely an incident due to the fact that their Testator was the last of the Trustees to die. This circumstance does not alter their position or give them any preferential rights over others as to costs. Mr. Baikes the Acting Advocate-General whom I directed to be added as a party, has made a successful fight for the Trust and earned the gratitude of all those interested in upholding the Trust, and I would be extremely sorry if I is

costs are not fully recovered from the Trust Funds I regret I can find no precedent enabling me to give him priority as to his costs The only order under the circumstances, I can make, is that the costs of all parties appearing before me be paid out of the Trust property—those of the Advocate General being taxed between attorney and client Costs to be taxed as if this Originating Summons had been a long cause

I cannot conclude this judgment without expressing my sense of obligation to the members of the legal profession engaged in this case, most especially to Mr Bahadurji, for the very valuable assistance they have rendered to the Court throughout the case.

Attorneys for the plaintiff —*Messrs Wadia, Gandhi & Co*

Attorneys for defendant No 1 —*Messrs Pestonji, Rustim & Kola*

Attorney for defendants Nos. 10 and 11 —*Mr P. S. Ballivisia*

Attorneys for defendant No 12 —*Messrs Jehangir, Gulabhbhai and Billimoria*

B N. L.

*Notes* —Italicised words or sentences occurring in quotations from treatises or documents and embodied in this judgment, led into that Mr Justice Dwyer does not to emphasise those particular words or sentences and do not indicate that they were so italicised in the originals from which the quotations are taken —EDITOR.

## CRIMINAL REVISION

*Before Chief Justice Scott and Mr Justice Heaton*

EMPEROR v BABULAL KANWALAL\*

*Penal Code (Act XLV of 1860) secs 21 186—Public Servant—Obstruction to a public servant—Clerk in the cess collection department of a District Municipality—Bombay District Municipal Act (Bombay Act III of 1901)*

A clerk in the cess collection department of a District Municipality constituted under the Bombay District Municipal Act (Bombay Act III of

\* Criminal Application for Revision No. 66 of 1903

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1901), is a public servant within the meaning of section 21, clause 10 of the Indian Penal Code (Act XLV of 1860), and any obstruction offered to him in execution of his duties is an offence punishable under section 186 of the Code.

THIS was an application for revision under section 435 of the Criminal Procedure Code (Act V of 1898) against the conviction and sentence recorded by the Honorary First Class Magistrate of Ahmedabad

The complainant was a clerk in the cess collection department of the Ahmedabad City Municipality.

The Municipality served a bill for privy tax (Rs. 2-1-0) upon the accused, in respect of his house. The amount not having been paid, a notice of demand was served upon the accused. The Municipality subsequently obtained a warrant of attachment, which they attempted to serve through their clerk, the complainant. When the complainant went to the accused's house to execute this warrant he was obstructed by the accused, who was thereupon tried for and convicted of an offence punishable under section 186 of the Indian Penal Code (Act XLV of 1860). The accused was sentenced to pay a fine of Rs. 25.

The accused applied to the High Court

*L. A. Shah*, for the accused —

The complainant is not a public servant within the meaning of section 21 of the Indian Penal Code. The act of the accused therefore does not amount to an offence under section 186 of the Code.

There was in the old Municipal Act (Bombay Act II of 1884, section 46) a provision making all Municipal servants public servants within the meaning of section 21 of the Indian Penal Code. The present Municipal Act (Bombay Act III of 1901, section 45) however makes only particular servants public servants for certain limited purposes.

The case of *Reg. v. Bantarani Uttamram*<sup>1)</sup>, which is against my contention, was decided under the old Municipal Act of 1859, where there was no provision corresponding to section 45 of the

present District Municipal Act. Referred to *Imperor v. Gulab* <sup>(1)</sup> and *Imperor v. Ezekiel* <sup>(2)</sup>.

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*M. N. Mehta*, for the complainant, was not called upon

SCOTT, C. J. —The accused and his wife were living together in a house in Ahmedabad and were liable for Rs 2-1-0, in respect of pany tax for the house they were living in under section 82 of Act III of 1901. A bill for the sum claimed for the tax was presented to the accused although the bill itself was made out in the name of his wife. The bill not having been paid notice of demand in the statutory form prescribed in Schedule B was served upon the accused and on his failure to pay a warrant was served upon him by the complainant Lakshmi-shankar Maganlal who was a clerk in the cess-collection department of the Ahmedabad Municipality. When the warrant of attachment was taken to the accused for execution according to law the accused obstructed the complainant in the execution of the warrant. For this he has been charged under section 180 of the Indian Penal Code and there is no doubt that he is guilty if the complainant was a public servant executing his duty within the meaning of that section of the Indian Penal Code.

Public servants are defined by the Penal Code, section 21 clause (10) of that section includes in the term "public servant" every officer whose duty it is as such officer to receive any property for the secular purpose of any taluka or district.

We are of opinion that the complainant being clerk in the cess collection department of the Municipality falls within the words of clause (10), which we have read, and we are supported in that conclusion by the judgment of this Court delivered in the case of *Reg v Nantamram Usamram* <sup>(3)</sup>.

We, therefore, think that the conviction was right and we dismiss the application.

R R

(1) (1934) 1 All L J 125

(2) (1904) 6 Bom L J 51.

(3) (1859) 6 Bom H C 1 Cr Ca 51





## LEGISLATIVE DEPARTMENT.

[These publications may be obtained from the Office of the Superintendent of Government Printing, India No 8 Hastings Street Calcutta.]

The Prices of the General Acts Local Codes Merchant Shipping Digest Index to Enactments and the Digests of Indian Law Cases 1901 to 1907 (separately and per set of five volumes) have been considerably reduced.

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Pleaders are a  
the Courts in  
ice gives them  
ity to use that

influence for the purpose of bringing the administration of justice into contempt

A pleader, who presides at a public meeting and therein procures the passing of a resolution contemptuously denouncing or protesting against the conduct of a High Court Judge in passing sentence at a trial at the Criminal Sessions, is guilty of misbehaviour (under section 56 of Regulation II of 1827)

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process of the Court is a contempt of Court.

Judges and Court are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act a contrary to law or the public good, it is not a contempt of Court

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*See PRACTICE*

**CRIMINAL PROCEDURE CODE (ACT V OF 1898), SECS. 233, 234, 235, 236**  
*237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000*

to appeal to, in  
 charged with an  
 (Act XLV of  
 and also with  
 with regard to  
 another article which he published in the same newspaper For all these offences  
 he was tried at one trial, and was convicted and sentenced for each of them

*Held*, that there was no irregularity in the trial on the ground of misjoinder  
 of charges.

Sections 234, 235, 236 and 239 of the Criminal Procedure Code, 1898, mentioned

could never be invoked to prevent a miscarriage of justice arising from a failure  
 to make good all the details of a charge joined with two other charges under  
 section 234

The Legislature could hardly have intended that a joint trial of three  
 offences under section 234 of the Criminal Procedure Code, 1898, should prevent  
 the prosecution from establishing at the same trial the minor or alternative  
 degrees of criminality involved in the acts complained of.

Sections 235 (3) and 236 of the Criminal Procedure Code, 1898, may be  
 resorted to in framing additional charges where the trial is of three offences of  
 the same kind committed within the year

the Privy Council, the  
 taking that grave  
 departure from

*Ex parte Carew* [1897] A. C. 719, and *Dunluvin v Attorney General of Zulu-*  
*land* (1889) 61 L. T. 740, followed

*In re BAL GANGADHAR TILAK* ... (1908) 33 Bom. 231

**CRITICISM**—*Language used in criticism which strikes at the root of all respect for*  
*the Court—Contempt of Court.*

*See CONTEMPT OF COURT*

**DEBTS**—*Son's liability to pay father's debts—Attachment of son's share in family*  
*property—Father's power to deal with the attached share—Hindu Law—Civil*  
*Procedure Code (Act XIV of 1882), sec 276.*

*See HINDU LAW*

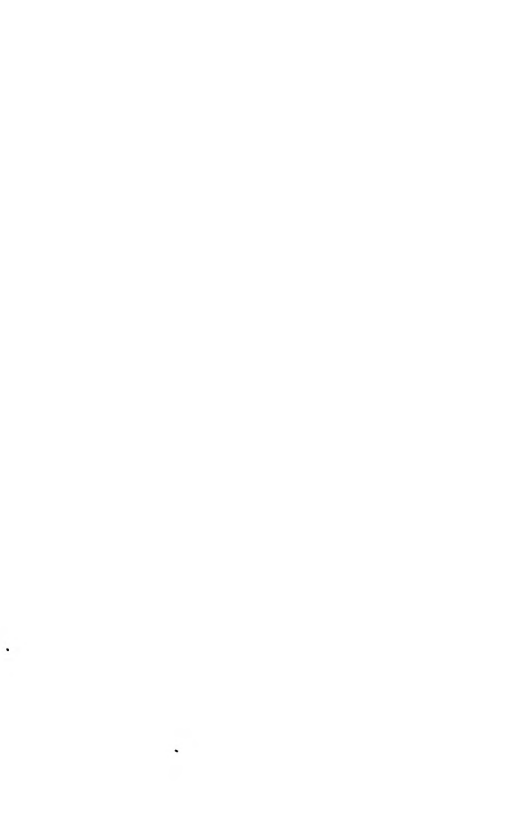
**DECREE**—*No specific direction as to accounts in the decree—Court cannot direct*  
*accounts to be taken before the Commissioner when parties have arrived at an*  
*agreement after the decree—Appeal against such an order—Practice*

*See PRACTICE*

**DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), SEC 7**—  
*Defendant summoned for examination—Payment of batta* ] It is not necessary  
 to pay batta to any agriculturist defendant summoned to be examined under  
 section 7 of the Dekkhan Agriculturists' Relief Act (XVII of 1879)















present District Municipal Act Referred to *Emperor v Gulab* (1) and *Emperor v Ezekiel* (2).

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v  
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*M N Mehta*, for the complainant, was not called upon

SCOTT, C. J. —The accused and his wife were living together in a house in Ahmedabad and were liable for Rs 2 1-0, in respect of privy tax for the house they were living in under section 82 of Act III of 1901. A bill for the sum claimed for the tax was presented to the accused although the bill itself was made out in the name of his wife. The bill not having been paid notice of demand in the statutory form prescribed in Schedule B was served upon the accused and on his failure to pay a warrant was served upon him by the complainant Lakshmi-shankar Maganlal who was a clerk in the cess collection department of the Ahmedabad Municipality. When the warrant of attachment was taken to the accused for execution according to law the accused obstructed the complainant in the execution of the warrant. For this he has been charged under section 186 of the Indian Penal Code and there is no doubt that he is guilty if the complainant was a public servant executing his duty within the meaning of that section of the Indian Penal Code.

Public servants are defined by the Penal Code, section 21 clause (10) of that section includes in the term "public servant" every officer whose duty it is as such officer to receive any property for the secular purpose of any taluka or district.

We are of opinion that the complainant being clerk in the cess collection department of the Municipality falls within the words of clause (10), which we have read, and we are supported in that conclusion by the judgment of this Court delivered in the case of *Reg v Nantamram Ullamram* (3).

We, therefore, think that the conviction was right and we dismiss the application.

R. R.

(1) (1904) 1 All L J 125.

(2) (1904) 6 Bom. L. R. 51.

(3) (1887) 6 Bom. II, O. R. Cr. Ca. 64.

## ORIGINAL CIVIL.

*Before Mr Justice Chandavarkar and Mr Justice Batcherlor*

1908

March 7

SIR JEHANGIR COWASJI JEHANGIR, APPELLANT AND PLAINTIFF,  
v THE HOPE MILLS, LIMITED, AND OTHERS\*, RESPONDENTS AND  
DEFENDANTS

*Practice—Decree—No specific direction as to accounts in the decree—Court cannot direct accounts to be taken before the Commissioner when parties have arrived at an agreement after the decree—Appeal against such an order*

A decree of the High Court on the Original Side contemplated an account being taken between the parties but it was silent on the question as to how that account was to be taken whether by the Commissioner or by some person selected by both the parties. The Court of first instance decided that where a direction as to account ought to have been incorporated in a decree when passed it was competent to the Court at any stage of proceedings to direct necessary inquiries or accounts to be made or taken.

*Held*, on appeal that as some account was taken under the decree by a person appointed jointly by the parties a new agreement had come into existence superseding the decree, and the Court was not competent to make the order appealed against.

An appeal lies against an order of a Judge sitting on the Original Side if that order decides a question of some right between the parties.

APPEAL from an order of Davar, J

The plaintiff, Sir Jehangir Cowasji Jehangir, as mortgagee in possession of the property of the first defendant company, The Hope Mills, Limited, instituted this suit in August 1903 to recover the moneys due to him under his mortgage and prayed that in default of payment the right to redeem may be foreclosed or the mortgaged premises might be sold. The mortgage was dated the 5th April 1900. After the date of the mortgage the plaintiff on the 30th of May 1901 had entered into an agreement with the first defendant company under the terms of which he worked the Mills of the company.

On the 26th of January the plaintiff obtained a decree which was defective in some respect. On the 9th August 1904, an application for final decree for foreclosure or sale was refused.

on the ground that the exact amount due to the plaintiff as first mortgagee was not determined.

On the 19th of October 1907 one Jivanlal Choonulal Chinoy, claiming to be the senior partner in the firm of Rangildas Bhoo-kandas and Co agents of the first defendant company, obtained on behalf of the company, a rule nisi calling upon the plaintiff to show cause "why he should not pass his accounts as first mortgagee in possession of the moveable and immoveable property of the said first defendant company before the Commissioner for taking accounts."

The rule was argued before Davar, J., on the 21st November 1907, who made the rule absolute by ordering the plaintiff to pass his accounts before the Commissioner.

Against this order the plaintiff appealed.

*Scott, Advocate General, and Robertson* for the appellant. In the course of this argument they referred to the following cases—*Ajudhia Pershad v Baldeo Singh*<sup>(1)</sup>, *Nandram v Babaji*<sup>(2)</sup>, *Triluck Singh v Parsolein Proshad*<sup>(3)</sup>, *Tara Prosad Roy v Bhobodeb Roy*<sup>(4)</sup>, *Alakunnissa Bibee v Roop Lal Das*<sup>(5)</sup>, *Tara Pado Ghose v Kamini Dass*<sup>(6)</sup>.

*Setalvad* (with *Raikes*) for the respondent.

CHANDAVARKAR, J.—We are of opinion that the order appealed from ought to be set aside.

A preliminary point has been raised by the learned counsel for the respondent that no appeal lies from that order upon the ground that it was made under either section 206 of the Civil Procedure Code or Rule 305 of this Court's Rules.

In order to bring the order under section 206 of the Code it is necessary that the application was made to bring the decree into conformity with the terms of the judgment or to correct or rectify a clerical or arithmetical error found in the decree. Now, it is not pretended by the counsel for the respondent that the decree or order was defective on the ground of a clerical or

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(1) (1874) 21 Cal. 818 at p. 83.

(2) (1897) 22 Bom. 771.

(3) (1893) 22 Cal. 924.

(4) (1895) 22 Cal. 931.

(5) (1897) 22 Cal. 117.

(6) (1901) 29 Cal. 644.

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arithmetical error; nor has it been argued that there was any inaccuracy to bring the decree within the terms of Rule 305. What has happened is that while the decree contemplated an account being taken between the parties, it was silent on the question as to how that account was to be taken, whether by the Commissioner or by some person selected by both the parties. It is argued that the omission was due to pure inadvertence, but we do not think we can presume anything of the kind, because, as the learned Advocate General has said, the decree *nisi* was settled by the solicitors of the parties and they could not have failed to note what the terms they settled would mean.

Under these circumstances we must presume that the omission was intentional. The decree left it open to the parties to have the account taken and settled privately by some person of their nomination.

We do not think that the application made before the learned Judge in the Court below can be treated as one for the mere amendment of the decree under either section 206 of the Code or Rule 305.

It must be remembered that the defence set up by the appellant in the Court below was that after the decree, new rights had come into existence; that the decree having contemplated an account being taken, it had been taken by a person appointed jointly by the parties with the result that a certain sum was found due by the respondent company to the appellant. This is not disputed. In this state of facts the rights of the parties would fall within the law enunciated in the case of *McKellar v. Wallace*<sup>(1)</sup>. There the Right Hon. T. Pemberton Leigh in delivering the Judgment says:—"The law in cases of this kind I apprehend to be perfectly clear. Parties having accounts between them, may meet and agree to settle those accounts by the ascertainment of the exact balance; and, if they mean to ascertain the exact balance, it may be necessary for that purpose, and probably is necessary in most cases, that vouchers should be produced, and that all the information which is possessed on one side and the other, should be furnished in the settlement of those

(1) (1853) 5 Moo. L. A. 372 at p. 395.

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accounts, and, if it afterwards turn out that there are errors in the account, it is a sufficient ground for opening the account and for setting it right in a Court of Equity. If, on the other hand, persons meet and agree, not to ascertain the exact balance, but agree to take a gross sum as the balance, a sum which one is willing to pay, and the other is content to receive as the result of those accounts, it is obvious that the production of vouchers is entirely out of the question, and errors in the account are so also, for the very object of the parties is to avoid the necessity for producing these vouchers, upon the assumption that there are or may be errors in the account so settled, therefore, it is either an account stated and settled, in the formal sense of that expression, or, it is the case of a settlement by compromise. In either case it may be vitiated by fraud, in either case it is good for nothing, if, either from the collusion of the parties, upon the circumstances under which the settlement takes place it is proved in a Court of Equity, that the transaction was not so fairly and so fully understood between the parties, either from the confusion in which it was involved, or, from misrepresentations made on the one side or the other, as it ought to have been, and that injustice has been done to either side."

Therefore, if there is no fraud, it is a settled account and gives rise to new rights between the parties to the decree. Under these circumstances, what the learned Judge was deciding was the question of a right, by his order he has varied the decree which he had no jurisdiction to do in a proceeding such as this initiated by a rule nisi. We must, therefore hold that an appeal lies.

Another cogent ground is that the order now under appeal requires the plaintiff to file a suit. That certainly affects the plaintiff's rights. The plaintiff is entitled to say that he is not bound to file a suit. If the respondent questions the agreement between the appellant and the company there is no reason why the respondent should not, if he chooses, file a suit to have that agreement cancelled. Why should the appellant be compelled to file a suit? We think that again leads us to hold that an appeal lies.

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Having held that an appeal lies, we now come to the merits, and the observations, which I have made, dispose of that point also. We think there was no question of any amendment, and if new rights have come into operation between the parties, the Court was not called upon to modify the decree or to direct the plaintiff to file a suit and have the rights between the parties adjudicated upon. The plaintiff says there has been an account taken under the decree between him and the defendants and that as a result of the account a new agreement has come into existence between the parties. That is not disputed. His defence is in fact that the decree is superseded by the agreement. If it is so, it would be open to the defendants to have that agreement cancelled.

Under these circumstances, we must reverse the order appealed against with costs.

We do not express any opinion upon the question whether the agreement set up by the plaintiff falls within section 257A of the Code of Civil Procedure. That is not a question which was before the learned Judge or which can arise in this proceeding. The question now merely is whether the decree should be amended or not, and therefore, no question under section 257A can arise, nor can any question as to the invalidity of it upon any other ground be gone into.

We set aside the order and discharge the rule with costs.

The appellant is entitled to add the costs to his mortgage debt.

Attorneys for the appellant — *Messrs Mulla & Mulla.*

Attorneys for the respondents — *Messrs Bhaishankar, Kanga & Girdharlal, Messrs Malvi, Hiralal, Modi & Runchhoddas, and Messrs Daphtary, Ferreira & Divan.*

## ORIGINAL CRIMINAL.

*Before Chief Justice Scott and Mr Justice Batchelor*

IN RE BAL GANGADHAR TILAK.

1903

September 8

*Criminal Procedure Code (Act V of 1899) sections 233, 234, 235, 236, 237 and 239—Charges, joinder of charges—Privy Council leave to appeal to, in criminal case—Practice and Procedure*

The accused was charged with an offence punishable under section 124A of the Indian Penal Code (Act XLV of 1860) in respect of an article which he published in his newspaper and also with offences punishable under sections 124A and 153A of the Code with regard to another article which he published in the same newspaper. For all these offences he was tried at one trial and was convicted and sentenced for each of them.

*Held*, that there was no irregularity in the trial on the ground of misjoinder of charges.

Sections 234, 235, 236 and 239 of the Criminal Procedure Code, 1898 mentioned as exceptions in section 233 of the Code, are not mutually exclusive. If it had been intended that section 234 (2) or section 236 could not be made use of in co-operation with section 231, this intention could have been easily expressed. If the exceptions are mutually exclusive, the provisions of section 236 or 237 could never be invoked to prevent a miscarriage of justice arising from a failure to make good all the details of a charge joined with two other charges under section 231.

The Legislature could hardly have intended that a joint trial of three offences under section 234 of the Criminal Procedure Code, 1898, should prevent the prosecution from establishing at the same trial the minor or alternative degrees of criminality involved in the acts complained of.

Sections 235 (2) and 236 of the Criminal Procedure Code, 1898, may be resorted to in framing additional charges where the trial is of three offences of the same kind committed within the year.

Before granting a certificate for leave to appeal to the Privy Council the Court must be satisfied that there is reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of natural justice.

*Ex parte Curwen*<sup>(1)</sup> and *Dinwiddie v Attorney General of Zululand*<sup>(2)</sup>, followed.

The accused was the editor, printer and publisher of a weekly newspaper called the "Kesari", which was published at Poona.



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The newspaper, in its issue dated the 12th May 1908, contained an article entitled "The Country's Misfortune", and there appeared another article under the heading of "These remedies are not lasting" in its issue dated the 9th June 1908

The accused was charged before the Chief Presidency Magistrate of Bombay, by complaints filed separately in respect of each article. Each complaint alleged that the accused committed offences punishable under sections 124A and 153A of the Indian Penal Code, 1860, in respect of each of the two articles. Two inquiries were made, and the Magistrate committed the case to the High Court under two committing orders, each of which was based on charges under sections 124A and 153A in reference to each of the two articles.

When the trial in the High Court began, the Advocate-General applied for one trial on all the charges.

*Branson* (officiating Advocate-General) for the Crown —Section 234 of the Criminal Procedure Code, 1898, applies to this case. The offences charged are exactly the same; they are committed within three weeks of each other, and, therefore, they should be tried together at one trial. As a matter of fact, there are separate charges with respect to each of the offences. The prosecution desires one trial for all the charges. We are within the wording of section 235 of the Code. see *Emperor v Fattu* (1)

The incriminating articles, as well as the articles which are put in to show the intention of the accused, begin from the 12th May 1908. The newspaper in question has published a series of articles which form the subject matter of the charges, namely the articles of the 12th May and the 9th June, and a series of intervening articles upon which we rely as showing that they were all written as part and parcel of one transaction intended for the purpose of producing disaffection and disloyalty against the Government established by law in British India.

The accused in person —I contend that section 227 of the Criminal Procedure Code, 1898, is the section that applies to this case. The Magistrate has framed the charges under sections 233

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231 and 235 Section 231 applies to the charge when the charge is first framed by the Magistrate and there is no provision in the Criminal Procedure Code by which the different charges can be amalgamated as it is proposed at present. Secondly, though the articles are in the course of the same transaction, yet they form different subjects altogether, and it would be more convenient for me to have each of them tried separately. The two articles refer to different subjects, and if the trial is jointly carried on it will introduce a sort of confusion in my mind. Sections 231 and 235 are permissive, but section 233 is imperative. There are separate articles dealing with separate aspects of the question. They do not form part of one transaction.

*Branson* in reply — This is not a question of the amendment of charges at all. Even if it be so treated, the Court has great powers under section 226. As a matter of fact the two charges remain unaltered and I propose to try them both together.

I am entitled to put the charges before the Court, and in reference to the possible difficulty of there being four charges I submit that section 235 would dissipate that difficulty altogether. The charges under sections 124A and 153A will be treated as being alternative charges or charges framed in order to meet possibly of one or the other set of facts, in which case either offence might or might not be proved. In that case there would be four charges. In order to avoid the possibility of there being any difficulty or doubt, I propose to proceed under section 333 and say that for the present at all events I will not proceed under section 153A on the first article and that will result in a stay of proceedings and discharge of the accused but not an acquittal.

*DAIR, J.* — In this case two separate informations were laid before the Magistrate, and the Magistrate held two separate enquiries and made two separate commitments. The question now before me is whether the two cases can be taken together and tried at one trial. It would be extremely desirable from my point of view and also I think, in the interest of the accused himself that there should be one trial if possible and the whole

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question should be before one Jury who tries him. The accused, under section 233 of the Criminal Procedure Code, is entitled to be tried separately unless the provisions of sections 231, 235, 236 and 239 come into operation. I have grave doubts about section 235 applying to this application. It seems to me that there would be some difficulty in holding that separate newspaper articles written week after week would come under the "same transaction", but I have no difficulty whatever in ordering the same trial under section 231, provided that the charges do not exceed three. In this instance the charges are four, but the Advocate-General offers to make use of section 233 to stay proceedings with reference to one of the four charges. I am quite willing to allow him to make use of that section and to allow him to withdraw any one of the four charges he chooses to withdraw. But I do not wish the Advocate-General to be taken by surprise. I think it would be fair to the accused if the Crown is not prepared to go on with any particular charge or for convenience wishes, or feels inclined, not to proceed with one of the charges that I should under the powers given to me under the same section order that the discharge of the accused should amount to an acquittal. It is not right that the accused should have that charge hanging over him indefinitely. I will order three charges in the two cases to be tried at one trial provided that there are three charges only and the fourth one is abandoned and not kept hanging on the accused's head. That would be for the Advocate-General to decide.

The prosecution accordingly selected three charges, viz., those under section 124A and section 153A with respect to the article dated the 12th May 1908 and the one under section 124A as to the article published on the 9th June 1908.

The trial proceeded with a Jury, on the three charges. The Jury returned their verdict of guilty on all the three charges. The sentence passed was three years' transportation on the first charge under section 124A of the Indian Penal Code three years transportation on the second charge under section 124A, the two sentences to run consecutively and a fine of Rs 1,000 on the charge under section 153A.

After the sentence was passed the Advocate-General intimated to the Court that he would not proceed on the charge under section 153A, which was held over, and the learned Judge thereupon discharged the accused on that charge directing that the discharge should amount to an acquittal.

The accused, thereupon, applied for leave to appeal to the Privy Council. Among the grounds on which the leave was sought, were the following —

32 (h) That the learned Judge acted illegally in trying your petitioner at one and the same trial for at least three offences not of the same kind and not committed in the same transaction contrary to the express provisions of section 233 of the Criminal Procedure Code and in opposition to your petitioner's objection, thereby vitiating the whole trial and rendering it illegal null and void ab initio.

33 (a) That the learned Judge acted illegally in passing two sentences one under section 131A, Indian Penal Code and the other under section 153A, Indian Penal Code if it be held by the Court that the transaction is one and the same, but your petitioner submits that the transaction is not the same as ruled by the learned Judge.

32 (i) That the learned Judge acted illegally in passing two sentences one under section 121A and the other under section 153A upon one article and the one and the same act.

The Court in granting a Rule passed the following order —

As we stated yesterday we issue a Rule calling upon the Crown to show cause why the Court should not grant a certificate that this is a fit case for an appeal to the Privy Council on points 32 (h) and 32 (a) and (i) in the petition of the accused.

We have taken time to consider whether we should issue a Rule upon any other point and we have come to the conclusion that there is no substance in any of the other points that have been taken.

We think it right, however, to mention with regard to point 32 (r) as to the addition of a fresh charge at the close of the case with reference to the previous conviction that it appears to us upon the *ex parte* argument which we have heard that a procedure was adopted which is not contemplated by the Criminal Procedure Code. It was evidently adopted in order to bring to the mind of the Judge in passing sentence the fact that the

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prisoner had been previously convicted. But that fact was obviously already present to his mind, for he had cited copiously from the summing up of Mr. Justice Stutchey in the previous Tink Trial in 1837, and he had before him and present to his mind the affidavits that had been made on the bail application which mentioned the previous conviction and the undertaking which had been given by the prisoner upon his release. We, therefore, think there is no substance whatever in the objection that has been taken, and it would not be right to needlessly occupy the time of the Court by granting a Rule upon the point thus inviting further argument.

We make the Rule returnable on Wednesday next.

*Baptista*, in support of the rule —

Section 233, Criminal Procedure Code, lays down the fundamental rule, any contravention of which constitutes an illegality incurable by section 537 upon the Privy Council decision in *Subrahmanya Ayyar v King Emperor*<sup>(1)</sup>. This case was followed in several cases in Bombay see *King-Emperor v Krishnaswami*<sup>(2)</sup>, *Emperor v Nathalal*<sup>(3)</sup>, *Emperor v Lallubhai*<sup>(4)</sup>, *Emperor v Wassanj*, *Dayal*<sup>(5)</sup>, and *Emperor v Jethalal*<sup>(6)</sup>. The number of offences may be large or small. That makes no difference. If the rule is infringed the trial is illegal. In *Emperor v Wassanj Dayal*<sup>(6)</sup> only two offences under sections 380 and 414, Indian Penal Code, were charged. In *Nawab Khajak Solemollah Bahadur v Ishan Chandra Das*<sup>(7)</sup> the Court even held the trial was illegal for omitting to give the notice prescribed in section 145, clause (3), of the Criminal Procedure Code.

Section 234 does not apply, because the offences are not of the same kind as they do not come within the same section, and the amount of punishment is not the same.

Section 235 does not apply, for this section with all its clauses is confined to offences committed in the same transaction only see *Sher Shah v. Empress*<sup>(8)</sup>, *Gopaluni Narasany*<sup>(9)</sup>. If it were

(1) (1901) 2, Mad 61

(2) (1902) 4 Bom L R 53.

(3) (1907) 4 Bom L R 433

(4) (1902) 4 Bom L R 440

(5) (1904) 6 Bom L L 725

(6) (1903) 29 Bom 449, 7 Bom. L R 527

(7) (1905) 9 C W N 903

(8) (1887) P R No. 43 of 1887 (Cr.)

(9) (1883) Weir 827.

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not confined to the same transaction, the exceptions can never be illegal and the Privy Council ruling in *Subrahmaniam's case* would be wrong. In this case the two articles do not form part of the same transaction.

Section 236 is also confined to the same transaction. Moreover, it does not apply to the present case because this is no case of doubt.

It is, therefore, clear that the excepted cases in section 233, taken singly, do not sanction the trial in the mode in which it was conducted, but it is contended that if the exceptions are taken cumulatively the trial is legal. This depends upon the construction of section 233. The question remains whether they can be taken cumulatively. I submit they cannot be so taken.

The policy of section 233 is plainly designed for the protection of the accused. It is a humane rule for the purpose of preventing confusion, embarrassment, or prejudice to the accused by the very multiplicity of charges. The true construction would therefore be the one that would "suppress the mischief and advance the remedy." See Maxwell on the Interpretation of Statutes (3rd edition), Ch. X, pp. 367 *et seq.* and p. 385.

The natural meaning of the words in section 233 appears to be that the exceptions in section 233 should be taken *singly* and not *cumulatively*. No doubt the exceptions are joined by the word "and." But the words are "except in the *cases* mentioned in sections 234, 235, 236 and 239." This phraseology makes all the difference. We have to look to the *cases* mentioned in the sections and see whether the present trial is covered by any of those *cases* and not by a new case formed by a combination of two or more of those cases. It is, however, clear that section 234 cannot be taken cumulatively with section 239. See *Budhai Sheikh v. Tarap Sheikh*<sup>(1)</sup>. And must therefore be read as "or" so far as section 239 is concerned. That being so "and" must be read as "or" with respect to all the sections. It cannot be read "and" and "or" in the same section. Moreover, if the exceptions were not mutually exclusive, why not combine all the sections 234, 235, 236 and 239? This would render the rule

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in section 233 perfectly nugatory. It would then be difficult to conceive of any case of mis-joinder. If that was intended the Legislature would have used plainer language instead of all this circumlocution and would not make these elaborate provisions for possible contingencies. Besides the limited interpretation would prevent the law being circumvented by the addition of fictitious charges. For example, it is admitted that the offence under section 124A in one transaction cannot be joined with the offence under section 13A in another transaction and tried together. Yet the addition of a fictitious charge under section 124A in the second transaction would enable the Crown to do so if the aid of section 235 or section 236 can be invoked see *Abdul Majid v. Emperor*<sup>(1)</sup>

Furthermore, section 234 cannot be joined with section 235 as they are mutually destructive. Section 234 looks exclusively to number, time, and sameness of the offences without regard to the number of transactions. Section 235 is the converse of section 234. It looks exclusively to the sameness of the transactions and is indifferent as to the number, time and sameness of the offences. The essential ingredients of section 234 are immaterial in section 235 and *vice versa*. A combination of the two must end in the destruction of the essentials of each.

It is contended that the word 'section' in section 234 may be read as 'sections', and if that be done then the offences under sections 124A and 13A in one transaction can be joined with offence under sections 124A and 13A in respect of another transaction because then they are offences of the same kind as they fall respectively under the same sections. But if this be so, it would make no difference whether there are two or twenty offences in each transaction. This would render the protection designed by section 233 practically worthless. There is really no reason to read 'section' as 'sections'. The word 'transaction' in section 233 cannot be read in the plural see *Budhai Sheikh v. Tarap Sheikh*<sup>(2)</sup>. What section 233 is to 'transaction', section 234 is to 'section'. The General Clauses Act does not apply because to read 'section' in the plural is repugnant to the

(1) (1906) 33 Cal 1256 at pp 1267-68

(2) (1905) 10 C W N 32

context. If the present sections be compared with the sections on the same subject in Act X of 1872, it will be perceived that the Legislature disapproves of such extension in meaning. Section 453 of the old Code (Act X of 1872) is now section 234. In the old section 453 there was an explanation. It referred to the old section 155, which corresponded with the present section 236. The old explanation incorporated what is now section 236, in the very definition of 'offences of the same kind'. Thereby it extended the meaning of the expression 'offences of the same kind' see *Manu Moya v The Empress*<sup>(1)</sup>. But that explanation has no place in the present Code. Its exclusion from the new Code excludes section 236 (old section 455). The legislature has thereby indicated that now section 234 is not to include cognate offences or doubtful sections falling within section 236. *A fortiori* it must exclude other more distinct offences.

In this connection the addition of clause (2) to section 222 makes it clear that the word offence as used in section 231 was not intended to include every act so connected with that offence as to form part of the same transaction. see *Bhagwati Dial v. King-Emperor*<sup>(2)</sup> and *Subrahmanya Ayyar v King-Emperor*<sup>(3)</sup>. The whole question whether section can be read as sections and whether the exceptions can be taken cumulatively has been very carefully considered in *Bhagwati Dial v. King Emperor*<sup>(4)</sup>, *Kasi Viswanathan v. Emperor*<sup>(5)</sup>, *Aga Lun Maung v King-Emperor*<sup>(6)</sup>; and *Budhas Sheikh v Tarap Sheikh*<sup>(7)</sup>. All these cases hold that the sections are mutually exclusive, and section cannot be read as sections. see also *Bipin Chandra Pal v. Emperor*<sup>(8)</sup>, and *Queen v. Ilwara*<sup>(9)</sup>, *Queen Empress v Mulwa*<sup>(10)</sup>. The only exception is *Emperor v. Tibhoriandas*<sup>(11)</sup> decided the other day by a Division Bench of this Court. But that decision is distinguishable from the present case. In that case there were not distinct charges on sections 121A and 153A but one charge for both.

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(1) (1882) 9 Cal 371

(2) (1900) P R No 2 of 1905 (Cr.)

(3) (1901) 25 M.L. 61 at p 73

(4) (1907) 30 M.L. 28

(5) (1902) 2 Lower Burma R.L. 64.

(6) (1905) 10 C.W.N. 32.

(7) (1907) 33 Cal 161.

(8) (1854) 6 W.P. 81 (Cr., Pn.)

(9) (1892) 14 M.L. 50.

(10) ante p. 77 12 B.M. L. R. 801.



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They were regarded by the Appellate Court as alternate charges. The Appellate Court confirmed the conviction on one offence only, *viz.*, section 124A. The sentences were not separate on sections 124A and 153A. There was only one sentence and that within the maximum imposable under section 153A.

The grounds on which His Majesty will review criminal proceedings are specified in *Queen-Empress v. Bal Gangadhar Tilak*<sup>(1)</sup> and *In re Dillet*<sup>(2)</sup>. In this case there is an important question of law. Unless corrected the misjoinder will create a precedent that would divert the law into new channels and prove prejudicial to accused in other cases, and open the door to grave mischief and miscarriage of justice. The mode of trial adopted disregarded the forms of legal process. It is desirable to obtain the decision of the highest tribunal in the Empire upon this point. Secondly, if the trial is illegal, there can be no conviction and sentence. The detention of the petitioner in jail is a violation of the principles of natural justice and constitutes substantial and grave injustice. There is now no means of remedying the injustice except by an appeal to the Privy Council. This Court has not to see whether substantial or grave injustice is done, but leave that to the Privy Council. This Court has to make the requisite declaration if a *prima facie* case is made out. Thirdly, this case goes to the very root of jurisdiction. The Court has no jurisdiction to try a man on such a misjoinder of offences and charges. This is, therefore, a case where the Court should declare that it is a fit case for appeal to His Majesty in Council.

Robertson, Advocate-General, instructed by the Government Solicitor, to shew cause.—No attempt is made to bring this case within the rule laid down by the Judicial Committee of the Privy Council in *Ex parte Carcu*<sup>(3)</sup>. Every irregularity in procedure, as laid down in the Criminal Procedure Code, does not permit a party to go to the Privy Council, but the party seeking for leave must shew that departure from the required procedure has caused substantial and grave injustice to be done. It is not

(1) (1897) 2 B. & L. 112 at p. 150.

(2) (1897) 12 App. Cas. 459.

(3) [1897] A. C. 719.

sufficient to show that there was an irregularity, and to argue from that that because there was an irregularity there was also an illegality. Some little injustice inevitably results from every irregularity, but section 537, Criminal Procedure Code, is designed to cover such cases. In criminal cases leave is not given to appeal to the Privy Council upon the ground of a violation of a technical rule of procedure: see *Dinizulu v Attorney General of Zululani*<sup>(1)</sup>. No prejudice was caused to the accused in his trial by the joinder of charges, nor was there any violation of an express provision of the law. As to when special leave to appeal is granted: see Safford and Whiceler's Privy Council Practice, pp 755, 756, 757, *Attorney General of New South Wales v. Bertrand*<sup>(2)</sup>.

'Offence' is defined in section 4 (c), Criminal Procedure Code, as any act or omission made punishable by any law for the time being in force. The offence is the act or omission and it is with the act or omission that a man is charged. Here the acts are the publications on two different dates. There are, therefore, only two offences though the acts constituting such offences are punishable under different sections of the Code. The word 'act' may be compared with the word 'game'. Game is a general or a particular term. The game of golf, or cricket, &c, or one, two or more games of golf, &c. In the same way the word offence may be used in a general or a particular sense. The act constituting the offence may be punishable under several sections defining particular offences. The word 'offence' is used in a general sense in some sections of the Code and in a limited sense in others. In section 233 it is used strictly according to the definition meaning. The section does not say that for every act punishable under several sections the accused should be tried separately. What section 234 looks to is the 'act'; i.e., the general offence and not the particular one. This case is governed by the ruling in *Emperor v Trishhorandas*<sup>(3)</sup>.

The two articles formed part of the same transaction. If both articles could be charged under section 124A and tried at one trial under section 234, Criminal Procedure Code, the mere addi-

(1) (1899) 61 L. T. 740

(2) (1867) L. R. 1 P. C. 520 at p. 530.

(3) *ante* p. 77. 10 Bom. L. R. 801

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tion of a charge under section 153A in respect of the second article has not caused grave and substantial injustice. No suggestion is made that the accused was embarrassed in his defence. The accused himself said in his statement that the two articles formed part of one controversy.

Section 235, cl (1), Criminal Procedure Code, applies to this case, because a series of articles were published by the accused forming part of the same transaction, namely, that of defaming the Government. Section 235 cl (2) also applies. 'Offence' in this clause is used in a distributive sense. One act may give rise to several offences.

Section 233, Criminal Procedure Code, mentions as exceptions "sections 234, 235, 236 and 239." The word 'and' indicates that the Legislature did not mean these sections to be mutually exclusive.

Section 236 also applies, if the charge under section 153A is considered to be an alternative charge, and there is nothing in the mode in which the charges are framed in this case which militates against this view. In a trial under s. 236 it is not necessary that conviction should only be as regards one offence; the accused may be convicted on each of the offences charged.

As regards sentences, if the trial is legal, then the sentences are legal. Unless the trial is set aside the Privy Council will not interfere with the sentences.

*Bap'tista* in reply — "Act" and "offence" are not synonymous terms. Acts are not charged but offences are charged, and acts are only mentioned to give notice of the way in which the offence is committed. One act may give rise to many distinct offences. If a man fires a gun in a crowd where Police officers are doing duty he may hurt one, cause grievous hurt to another, murder a third, set fire to a house, and injure or kill Police officers. One single act of firing the gun would thus result in many offences. Offences are committed not by acts alone, but acts and their consequences, though juridically all these are acts. Similarly, if a man publishes an article whereby he defames A, B and C, he commits three distinct offences of defamation. So one publication may give rise to two offences under section 124A and

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section 153A of the Indian Penal Code, but they are nevertheless distinct offences and those offences are charged and not the act of publication. The act of publication is really one of the series of acts which constitute one transaction. The series of acts consist in writing each word of the article, delivering the written article to compositors, etc, and finally the publication in the newspaper.

The two articles do not form part of the same transaction. The accused said so in so many terms. The version of the official short-hand writer is not correct. The correct version is that given by the short-hand writer engaged by the accused and that, I understand, tallies with that of the short-hand writer engaged by the prosecution. Apart from this the accused cannot be pinned down to every word he utters in a charge to the jury or in urging his objections. It is quite clear from the points asked to be reserved that he regarded the transactions as distinct or else he could have no objection to the joinder of charges. Parties cannot make transactions the *same* if they are *distinct* in the eye of the law. As to what constitutes the same transaction, see Stephen's definition quoted in Cunnigham on Evidence (7th edn), p. 92. The point was fully considered in *Queen Empress v. Fakirappa*<sup>(1)</sup>, *Queen Empress v. Vajirani*<sup>(2)</sup>, *Emperor v. Punya Nanka*<sup>(3)</sup>, and *Emperor v. Sheinfalli*<sup>(4)</sup>. The publications of the 12th May and 9th June cannot form the same transaction. The authors are distinct persons. This we would have proved but Mr Justice Davar ruled that the transactions were not the same. The accused of course accepted the full legal responsibility but not the authorship. Secondly, the subjects are not the same. There is no continuity. There is an interval of nearly one month. The Crown regarded this as distinct transactions. The sanctions under section 196, Criminal Procedure Code, were distinct, one for each article. In the Criminal Sessions of the High Court the Crown applied for a Special Jury for each case and two Special Juries were ordered by the Judge. The Judge did not regard the transactions as the same. The Jury too went on that

(1) (1890) 15 Bom 491

(3) (1900) 4 Bom L.R. 750

(2) (1902) 16 Bom 414 at p. 404

(4) (1900) 27 Bom 135; 4 Bom L.R. 207

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basis and brought in distinct verdicts. In the face of two sanctions, two complaints, two warrants, two inquiries, two committals, two applications for Special Juries by the Crown, two convictions and two sentences on section 124 A alone, a third conviction on section 153 A and an acquittal on the second section 153 A, it is impossible now for the Crown to contend with any fairness that the two articles constitute the same transaction.

SCOTT, C. J.—This is a rule granted by us on a petition for a certificate that the decision of the judge and jury in the case of *Emperor v. B. G. Tilak*<sup>(1)</sup> is a fit subject for appeal to His Majesty in Council.

Before granting the rule we required counsel for the petitioner to specify the grounds upon which he was prepared to support his application. He then argued that a certificate should be granted as prayed for each of the reasons specified in paragraphs 32 to 35 of the petition. After hearing his arguments we decided that it was unnecessary to call on the Crown to show cause upon any points, except points (b) (c) and (d) of paragraph 32 of the petition and we accordingly granted a rule upon those points only.

The rule has now been argued. We can only grant the required certificate if in our opinion the case is a fit one for appeal. The test of fitness is furnished by various decisions of the Judicial Committee which show the circumstances under which they will entertain appeals in criminal cases. It is sufficient to refer to *Ex parte Carver*<sup>(2)</sup> and *Dinizulu v. Attorney-General of Zululand*<sup>(3)</sup>, in both of which the judgment was delivered by Lord Halsbury. In the former case the rule was stated thus: "It is only necessary to say that, save in very exceptional cases, leave to appeal in respect of a criminal investigation is not granted by this Board. The rule is accurately stated as follows, in the case to which their Lordships referred in the course of the argument: *In re Dillet*<sup>(4)</sup>, 'Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process, or

(1) (1906) 10 Bom. L. R. 849.

(2) [1897] A. C. 719.

(3) (1899) 61 L. T. 740.

(4) (1887) 12 App. Cas. 453.

by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.' In the latter case the Lord Chancellor said: "It appears to them that nothing could be more destructive to the administration of criminal justice than a sort of nation that any criminal case which was tried in any colony from which an appeal lay to this Committee can be brought here on appeal, not upon the broad grounds of some departure from the principles of natural justice, but because some form or technicality has not been sufficiently observed. That is a principle, which they believe, never has been permitted, and never, they trust, will be permitted." Therefore, before granting the certificate asked for, we must be satisfied that there is reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of natural justice.

We are not sitting as a Court of error. It is not for us to decide whether such injustice has in fact been done. We have merely to be satisfied that a reasonable case has been made out. The petitioner was tried before Mr. Justice Dwyer and a special jury on a charge framed under section 124A, Indian Penal Code, in respect of an article published in the *Kesari*, of which he was editor and proprietor, on the 12th of May 1908, and on another charge under section 124A and one under section 153A in respect of an article in the *Kesari* of the 9th June 1908. He was found guilty and sentenced on each of the first and second charges to three years' transportation, and on the third charge to a fine of Rs 1000.

It is now argued that the trial was illegal as being in contravention of the provisions of section 233, Criminal Procedure Code, which lays down that for every distinct offence there shall be a separate charge, and every such charge shall be tried separately except in the cases mentioned in sections 234, 235, 236 and 239.

The accused was originally charged separately before the Chief Presidency Magistrate on the 29th June, under sections 124A and 153A in respect of the article of the 12th May, and under the same sections in respect of the article of the 9th June.

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He was committed to the High Court Sessions for trial on both sets of charges

In the Sessions Court (as appears from the note of the official short-hand writer corrected by the learned Judge) the Advocate General appearing for the prosecution asked that the accused should be tried on the four charges at one trial, contending that the articles forming the subject of the charge, and certain other articles intermediate in point of time, formed one transaction, in which the offences charged had all been committed, and that therefore, the joinder was permissible under section 235 (1), Criminal Procedure Code. The learned Judge objected, that if the charges were consolidated, there would be four charges. The Advocate General then said he would not put the accused upon the charge under section 153A in respect of the first article.

The accused, who conducted his own case, with the assistance of several well-known lawyers, objected first, that there was no provision of the Code by which different charges could be amalgamated as proposed, and, secondly, that though the articles were in the course of the same transaction, yet they formed different subjects altogether, and it would be more convenient to have them tried separately, and confusing if they were taken together, that sections 234 and 235 were permissive, while section 233 was imperative, that the articles were separate articles dealing with separate aspects of the question, and did not form part of one transaction. Eventually, the learned Judge said he thought it would be extremely desirable, and in the interest of the accused himself, that there should be one trial, and that the whole question should be before one jury, the accused under section 233 was entitled to be tried separately, unless the provisions of sections 234, 235, 236 and 239 came into operation. He had grave doubts as to the applicability of section 235 as there would be some difficulty holding that separate newspaper articles written would come under the same transaction, but, in ordering the trial under section 234, did not exceed three. The trial then continued one under section 124A on the article of

under section 124A and another under section 153A, on the article of the 9th June, with the result above stated

After the verdict and before sentence the accused applied that certain points should be reserved and referred, under section 434, Criminal Procedure Code, for the decision of a Full Bench. The points mentioned are included in the points raised in the present petition. The Judge, however, declined to reserve any points.

Dealing now with the legal argument addressed to us that the trial was altogether unlawful as having been in contravention of the terms of section 233 it is apparent that the argument involves two assumptions: (1) that the offences charged were not "committed by the same person in a series of acts so connected together as to form the same transaction," and therefore did not fall within the scope of section 235 (1), and (2) that the exceptions mentioned in section 233 are mutually exclusive. The justification for the first assumption is by no means apparent. Besides the preliminary discussion upon the point to which we have already referred, we note that at the trial in addition to the articles of the 12th May and 9th June other articles and notes published by the accused in the *Asars*, from the 12th May to the 9th June inclusive, were put in (Exhibits E to I). The Judge in his charge to the Jury pointed out that the subject of all the articles, including those the subject of the charge, was the advent of the bomb. The accused himself when opening his defence read to the Court a written statement in which he stated that the charged articles were part of a controversy in which he had endeavoured to maintain and defend his views in regard to the political reforms required in India at the present day. In this connection we may also refer to paragraph 36 of the petition now before us. We think, therefore, that there are good reasons for the contention placed before us by the Advocate-General that the charges all fall within the scope of section 233 (1).

Assuming, however, that the Advocate-General's contention just referred to is unsustainable, the petitioner has still to make good the second assumption, namely, that the exceptions mentioned in section 233 are mutually exclusive. The words of the section do not favour this view. If it had been intended

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The accused, who conducted his own case, with the assistance of several well-known lawyers, objected first, that there was no provision of the Code by which different charges could be amalgamated as proposed, and, secondly, that though the articles were in the course of the same transaction, yet they formed different subjects altogether, and it would be more convenient to have them tried separately, and confusing if they were taken together, that sections 234 and 235 were permissive, while section 233 was imperative, that the articles were separate articles dealing with separate aspects of the question, and did not form part of one transaction. Eventually, the learned Judge said he thought it would be extremely desirable, and in the interest of the accused himself, that there should be one trial, and that the whole question should be before one jury, the accused under section 233 was entitled to be tried separately, unless the provisions of sections 234, 235, 236 and 239 came into operation. He had grave doubts as to the applicability of section 235 as there would be some difficulty in holding that separate newspaper articles written week after week would come under the same transaction, but he had no difficulty in ordering the trial under section 234 provided the charges did not exceed three. The trial then commenced on three charges, one under section 124A on the article of the 12th May, and one

under section 124A, and another under section 153A, on the article of the 9th June, with the result above stated.

After the verdict and before sentence the accused applied that certain points should be reserved and referred, under section 431, Criminal Procedure Code, for the decision of a Full Bench. The points mentioned are included in the points raised in the present petition. The Judge, however, declined to reserve any points.

Dealing now with the legal argument addressed to us that the trial was altogether unlawful as having been in contravention of the terms of section 233 it is apparent that the argument involves two assumptions (1) that the offences charged were not "committed by the same person in a series of acts so connected together as to form the same transaction," and therefore did not fall within the scope of section 235 (1), and (2) that the exceptions mentioned in section 233 are mutually exclusive. The justification for the first assumption is by no means apparent. Besides the preliminary discussion upon the point to which we have already referred, we note that at the trial in addition to the articles of the 12th May and 9th June other articles and notes published by the accused in the *Acars*, from the 12th May to the 9th June inclusive were put in (Exhibits E to I). The Judge in his charge to the Jury pointed out that the subject of all the articles, including those the subject of the charge, was the advent of the bomb. The accused himself when opening his defence read to the Court a written statement in which he stated that the charged articles were part of a controversy in which he had endeavoured to maintain and defend his views in regard to the political reforms required in India at the present day. In this connection we may also refer to paragraph 36 of the petition now before us. We think, therefore, that there are good reasons for the contention placed before us by the Advocate-General that the charges all fall within the scope of section 235 (1).

Assuming, however, that the Advocate-General's contention just referred to is unsustainable, the petitioner has still to make good the second assumption, namely, that the exceptions mentioned in section 233 are mutually exclusive. The words of the section do not favour this view. If it had been intended

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that section 235 (2) or section 236 could not be made use of in co operation with section 234, this intention could have been easily expressed. If the exceptions are mutually exclusive, the provisions of sections 236 or 237 could never be invoked to prevent a miscarriage of justice arising from a failure to make good all the details of a charge joined with two other charges under section 234.

For example, if A were charged with three thefts in buildings within the year and the evidence established that in one case the theft was committed on the roof and not in the building the accused could not be convicted of simple theft under the powers conferred by section 237 because the applicability of section 236 would be negatived by the mere fact of the joint trial under section 234.

We find it difficult to believe that the Legislature intended that a joint trial of three offences under section 234 should prevent the prosecution from establishing at the same trial the minor or alternative degrees of criminality involved in the acts complained of. For these reasons we think that the exceptions are not necessarily exclusive, and that sections 235 (2) and 236 may be resorted to in framing additional charges where the trial is of three offences of the same kind committed within the year.

It is of course possible for ingenuity to suggest cases in which the full exercise by the Court of the permissive powers conferred by the sections which we have been discussing may produce embarrassment. In such cases the discretionary power of the Court still remains to decline to avail itself of its full powers.

The view which commends itself to us was also taken by another Bench of this Court in the recent case of *Emperor v. Tribhuvandas* (1). In our opinion the learned Judge (though he appears to have overlooked section 234 (2)) might have allowed the trial to proceed on all four charges without violating the provisions of the law.

If we now for the purpose of argument assume that the petitioner has established the second assumption also we have

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still to be satisfied that reasonable grounds exist for thinking that grave and substantial injustice may have been done at the trial before we can grant the certificate. As we understood the argument on the rule it is not contended that injustice has been done except in so far as the alleged disregard of the provisions of Criminal Procedure Code in itself constitutes an injustice but we were urged to grant a certificate as the case would be important as a precedent.

We do not think the accused was in any way prejudiced by what took place at the trial. An accused person may it is clear be legally tried and convicted in one trial, under section 124 A or section 153 A, on charges framed on three disconnected articles. How then can it be said that grave and substantial injustice has been done by the arraignment and conviction of the accused on three cognate charges in respect of only two (and those not disconnected) articles?

As regards the question raised by paragraph 32 (a) and (b) of the petition with respect to the number of separate sentences imposed, the jury found the accused guilty of three distinct offences and the Judge awarded a punishment for them which in the aggregate is much below the maximum punishment allowed for one of the offences under section 124 A. There has, therefore, been no violation of the provisions of section 71 of the Indian Penal Code.

For the above reasons we discharge the rule.

Before leaving the case however we think it right to point out that the Advocate General, according to the note of the official short hand writer, stated that the charges under sections 124A and 153A would be treated as being alternative charges or charges framed in order to meet the possibility of one or the other set of facts being proved, in which case each offence might or might not be proved. This may mean either that the second and third charges fell under section 235 (2), or that they fell under section 230. The charges as framed were not expressed to be in the alternative, and the verdict of guilty was given in respect of each charge separately. There was, we think, nothing illegal in this, but if it was the intention of the Crown that the

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second and third charges should only operate alternatively the result intended can now be arrived at by the exercise by the Government of its powers under Chapter XXIX of the Criminal Procedure Code in respect of the sentence imposed under section 153A upon the third charge.

*Rule discharged.*

R R

## ORIGINAL CRIMINAL.

*Before Chief Justice Scott and Mr Justice Batchelor*

IN RE NARASINHA CHINTAMAN KELKAR

1908,

September 29

*Contempt of Court—Criticism of Judge—Language used in criticism which strikes at the root of all respect for the Court*

Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt or to lower his authority, or to obstruct or interfere with due course of justice or the lawful process of the Court is a contempt of Court

Judges and Court are also open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, it is not a contempt of Court.

*Reg v Gray* (1), followed

THIS was a rule calling upon Narsinha Chintaman Kelkar, editor of the "Mahratha," to show cause why he should not be committed or otherwise dealt with according to law for contempt of Court in respect of defamatory passages concerning the Honourable Mr. Justice Davar, contained in an article published by him in the issue of his newspaper dated the 26th July 1908

The rule nisi was in the following terms —

Upon reading the affidavit of J. C. G. Bowen, Acting Public Prosecutor, Bombay, sworn on the 12th day of September 1908 and after leaving the Advocate General, Bombay, who applies that a rule nisi be issued against Narsinha Chintaman Kelkar Editor and Publisher of the 'Mahratha' newspaper, requiring him to shew cause, if any he has, why he should not be committed or otherwise dealt with according to law for contempt of Court in respect of an

article published by him on pages 349, 350 and 351 of the issue of the said newspaper dated the 26th July 1908 containing certain contemptuous and defamatory matters of and concerning the Honourable Mr. Justice Davar, one of His Majesty's Judges of the High Court, Bombay, and more particularly in respect of the following passages printed and published in the said newspaper.

\* \* \* \* \*

It is ordered that the said Narsinha Chintaman Kelkar do appear before this Honourable Court on Wednesday next the 23rd of September 1908 to show cause why he should not be committed in respect of the said article. And it is further ordered that this rule be served on the said Narsinha Chintaman Kelkar through the District Court of Poona.

At the hearing Mr. Kelkar put in the following affidavit —

I, Narsinha Chintaman Kelkar, of Poona, Hindu inhabitant at present temporarily residing at Sardar Grah, Esplanade Road, outside the Fort of Bombay solemnly affirm and say as follows: I am a regular resident of Poona and have no permanent residence or fixed place of abode in Bombay and have come to Bombay to answer the rule issued against me. I am the editor and publisher of the 'Maharatha' weekly paper printed and published in Poona. I am not the proprietor or manager of the paper. I admit that I wrote the article forming the subject matter of the present notice and accept full responsibility for the same. I followed the course of the trial keenly as a personal friend of Mr. Tilak and wrote the article immediately after his conviction and hence there is a certain amount of feeling in it, but I say that in writing the article I had no desire and no intention whatever to scandalise this Honourable Court or any of the Judges thereof or to defame the Honourable Mr. Justice Davar or any other Judges of this Honourable Court. I had also no desire and no intention to interfere in any way with or obstruct the course of administration of justice. The article was written after the whole trial was finished. I honestly and conscientiously believed myself called upon as a journalist to comment on certain features of the case and to offer certain expostulations about certain things said and done in the course of the case and also to protest against certain extrajudicial expressions of opinion which, I felt, did not do justice to the character and motives of Mr. Tilak. I wrote the article in the discharge of what I believed to be my duty as a journalist and an exponent of public opinion so far as I could claim to voice it. The article was intended as a fair and legitimate comment on a matter of public interest and nothing more. With this explanation of my motives and intention and the circumstances under which the article was written, I place myself unreservedly in the hands of this Honourable Court.

On 23rd September the Rule came on for hearing

*Baptista*, to show cause:—I will divide my arguments into two parts: (1) Did the publication of the article constitute contempt of Court? And (2) if it did, was it necessary in the

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interests of administration of justice that the Court should exercise its power to commit for contempt on the present occasion?

(1) The law is that so long as a case is pending no one can say or do anything which may be calculated to interfere with the course of administration of justice, but once the case is over both the Judge and the Jury are handed over to public criticism. The comments made on Mr Justice Davar are criticisms upon him in his personal capacity. The writer has drawn distinction between the Judge as a Judge and the Judge in his personal capacity. Comments on a Judge in his personal capacity came within the rule laid down in *In the Matter of a Special Reference from the Bahama Islands*<sup>(1)</sup>. Comments on Mr Justice Davar as Judge do not exceed fair and legitimate criticism. There is no intention to vilify or bring the Court into contempt. We expressly repudiate any such intention in our affidavit. There is no word of aspersion on the integrity of the Judge. There is an amount of feeling imported in the article, because Mr Kelkar is Mr Tilak's personal friend and associate for many years, and wrote the articles under the influence of a great feeling.

(2) The power of committing a person for contempt is very sparingly exercised by Courts, it has almost become obsolete in England see *McLeod v St Aubyn*<sup>(2)</sup>. It has always been exercised in the interests of the administration of justice only, see *Dallas v Ledger*<sup>(3)</sup>. In this case there was no interference with administration of justice in any way, and committal for contempt is therefore not necessary to promote due administration of justice.

*Jardine* (officiating Advocate-General) in support of the rule. — The article in question suggested that the Court was deliberately partial in the trial of the Tilak case, that the Judge was acting in collusion with the Government in hurrying the trial to a conclusion, and that the Judge deluded Mr Tilak by protestations of his desire to protect Mr Tilak's interest into a false security

<sup>(1)</sup> [1893] A C 138

<sup>(2)</sup> [1899] A. C. 840.

<sup>(3)</sup> (1899) 4 T L R 432 at p 434

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which disappeared when the proceedings came to an end Mr Kelkar was up to the last time given an opportunity by your Lordships to express his regret but he has not availed himself of it He must, therefore, be taken to be prepared to stand or fall by what he has written in his paper He has directly challenged the purity of the Court For the purpose of contempt of Court it is immaterial to consider whether the comments were made on Mr Justice Davar as a Judge or as a gentleman Whatever Mr Justice Davar did or said was in his judicial capacity and in no other capacity The Press has a full right to criticise a trial after it is finished but the criticism should be couched in proper terms and no derogatory expressions should be used in connection with the presiding Judge The decision in *In the Matter of a Special Reference from the Bahama Islands*<sup>(1)</sup> does not apply The Judge there did something that was extra judicial In the article in question the writer has made statements which go to show that the administration of justice in the High Court is not pure

SCOTT, C J—On the 16th September, we granted a rule, at the instance of the Advocate General, calling on Narsinha Chintaman Kelkar, as editor and publisher of the "Maharatta" newspaper, to show cause why he should not be committed or otherwise dealt with according to law for contempt of Court in respect of an article published by him in the issue of the said newspaper of the 26th of July 1908, containing certain contemptuous and defamatory matter of, and concerning Mr Justice Davar one of the Judges of this Court The accused has put in an affidavit in which he admits that he wrote the article, but defends it as fair and legitimate comment on a matter of public interest (namely, the trial of Bal Gangadhar Tilak) written after the trial was finished in the discharge of his duty as a journalist

The article, which is in English and divided into seven paragraphs, suggests very plainly in the third paragraph that at the trial the conviction of the accused was secured by Government by the collusion of the presiding Judge, that the Judge, in allowing



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only half an hour for the midday adjournment realized the importance of finishing the trial on the day before the Indian Budget debate in Parliament and that by means of significant hints to the Advocate General, and unusual haste in closing the proceedings the net was woven around the life of the accused surreptitiously, in the closing vesper hours. These suggestions appear to rest upon no more solid basis than the fact that, as happens from time to time in criminal trials in the High Court, the sitting was prologged after the usual hour of rising on the last day of the trial in order to finish the case that evening.

In the fifth paragraph of the article the honesty of the Judge is again the subject of attack. He is said to have been guilty of affectation in the solicitude he expressed for the accused during the trial and that when the moment for the charge to the jury had arrived, everything was changed, for as soon as the Judge had found his liberty of speech, he made every point against the accused, taking upon himself to bestow a one-sided and adverse treatment on the incriminating articles and trying to make the case more complete for the prosecution, than the Advocate General himself had done, by ferreting out hidden words and hidden innuendoes, which were never touched by counsel for the Crown. We have had occasion recently to examine the proceedings at the trial on the application of the accused for leave to appeal to His Majesty in Council, and we consider that there is no justification whatever for such remarks.

In the sixth paragraph of the article the writer states that he is going to blame Mr Davar the gentleman and not Mr Davar the Judge and then proceeds to discuss certain remarks of the Judge uttered in his judicial capacity when passing sentences, referring to the Judge as a medical quack in a red robe, as an enemy of the accused, privileged to sit upon the Bench, as an impudent glow worm holding his torch to the Sun.

Counsel for N. C. Kelkar has not attempted to justify the passages to which I have referred, but has claimed that a Judge after the trial is over, is handed over to criticism and that the article amounts to criticism and nothing more. In my opinion the article far oversteps the bounds of fair criticism. It attacks

the independence and honesty of the Judge without any justification and indulges in scurrilous abuse of him in his character of a Judge presiding at the Criminal Sessions of this Court.

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I can make no remarks on this case more appropriate than those contained in the following passages from the judgment of the Lord Chief Justice of England in *Reg. v. Gray* <sup>(1)</sup>.

It is not too much to say that it is an article of scurrilous abuse of a judge in his character of a judge. It cannot be doubted that the article does constitute a contempt of Court. Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority, is a contempt of Court. . . . Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court. The former class belongs to the category which Lord Hardwicke, L. C., characterised as 'scandalising a Court or a Judge'. That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published, but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen. Now, as I have said, no one has suggested or could suggest, that it falls within the right of public criticism in the sense I have described. It is not criticism. I repent that it is personal scurrilous abuse of a judge as a judge. We have therefore to deal with it. . . . *breve manu.*"

The position of N. C. Kelkar has not been improved by the defiant attitude taken up by counsel upon his instructions. Although every opportunity was given to him to submit and apologise, it was stated to the Court that he thought it more manly and straightforward to wait and see whether the Court found him guilty before offering any apology or submission.

This is a very serious case and must be met by a suitable sentence not only as a punishment for this particular contempt, but also as a warning to other persons

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only half an hour for the midday adjournment realized the importance of finishing the trial on the day before the Indian Budget debate in Parliament and that by means of significant hints to the Advocate General, and unusual haste in closing the proceedings the net was woven around the life of the accused surreptitiously, in the closing vesper hours. These suggestions appear to rest upon no more solid basis than the fact that, as happens from time to time in criminal trials in the High Court, the sitting was prolonged after the usual hour of rising on the last day of the trial in order to finish the case that evening.

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The position of N. C. Kelkar has not been improved by the defiant attitude taken up by counsel upon his instructions. Although every opportunity was given to him to submit and apologise, it was stated to the Court that he thought it more manly and straightforward to wait and see whether the Court found him guilty before offering any apology or submission.

This is a very serious case and must be met by a suitable sentence not only as a punishment for this particular contempt, but also as a warning to other persons.

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BATCHELOR, J.—The article in respect of which this rule was granted, appeared in the English language in the respondent's newspaper, the "Maharatta." The article itself proves, and Mr. Baptista has admitted before us, that the respondent is perfectly familiar with English. The only question, therefore, is, as to the meaning of the article, read as a whole and construed as it would be construed by the ordinary reader. Upon the best consideration that I can give to the article, I am clear that it constitutes a gross instance of that form of contempt of Court, by which, as it is said, the Court is scandalised. Nor is any serious attempt made to disguise this meaning. After a preparatory paragraph of no special consequence the writer proceeds at once to his thesis, and observes that "in the first place they (the public) do not know what value to attach or what sense to apply to the assertion that Mr. Tilak got a fair trial." Then after other allusions to the "unfairness of the trial," the writer promises later of "the unfairness of the Judge." He keeps his promise in the succeeding paragraphs, which abound in scurrilous attacks on the "mockery of a trial," to the "affectation" of the Judge, who is represented as concealing his hostility to the prisoner. At the time came to charge the jury when, we are told, he abused counsel for a one-sided and adverse treatment of the articles, and he brought out hidden words and innuendoes unnoticed by the General, to make the case for the prosecution more formidable than Counsel for the Crown had made it. I entirely agree with that part of Mr. Baptista's address in which he insisted that upon the conclusion of a trial, the Judge is handed over to not criticism, but in my opinion, such writing as this is not criticism and is entirely beyond the reach of the argument. I agree, too, that the Court should ordinarily be slow to punish for contempt, especially where there is any ground for hope that the common sense of the many will correct the extravagance of an individual, but here I cannot do so, that the unchecked dissemination of such views as are stated in this article, would tend to create the opinion which the respondent has expressed in his newspaper, though he does not maintain it in this Court. For among large numbers of the less instructed people of this country the groundlessness of an opinion is no obstacle to its prevalence, and it

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is plain that nothing could well be more prejudicial to the administration of justice than the prevalence of such opinions as the respondent has published broadcast for the acceptance of the readers of his paper. As to the distinction which it was sought to establish, both by the respondent in his article, and by his counsel in argument, between the personal and judicial character of the Judge, I am of opinion that no such distinction exists, inasmuch as whatever was done and said by Mr Justice Datar at the trial, was done and said by him in his judicial capacity alone.

Despite the force of these considerations, we hoped, up till the hearing, that we might be able to extend to the respondent the same clemency which we had shown to similar offenders. Connected with another journal but the respondent is of our power to follow this course by the contumacious attitude which he has elected to adopt. In reply to our suggestions from the Bench, Mr Baptista said that he had no instructions to express apology or contrition, and that his client desired him to leave the matter to his advisers on that footing. That being so, I think that we have but it is to put to mark our sense of the respondent's misconduct greater and more serious position of substantial punishment. The only of public criticism of mitigation which I am able to discover are that it is perfectly reasonable to have said no. I had concluded when the article was published and, as I with it, compared to believe, that the respondent was partly by his friendship for the prisoner. On the other hand,

The respondent is himself a Pleader, defendant, and would scarcely have failed to realise what mischief would result from such language as he has employed, language which is at the root of all respect for the Court and its authority. He understood that this is the ground upon which the Court is acting, and not from any desire to vindicate Mr Justice Datar from the respondent's misrepresentations. It is in the interests of the due course of justice, and of the authority of this Court, that I conceive it to be our clear duty to take notice of respondent's misconduct. I have said that there has been no expression of regret, and that obliges me to go a little further and notice specifically the position taken by the respondent in

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this Court. When definitely questioned upon the matter, Mr. Baptista, so far as I was able to understand him, said that his client considered it would be more honest or manly to defer any expression of regret until the Court had pronounced its judgment. The plain English of this seems to be that the respondent will wait till other means of escaping punishment have proved unavailing, before he considers the desirability of expressing regret for his misconduct. That is a course in which I can see some indication of policy; but its connection with manliness or honesty is certainly remote.

For these reasons I agree with the order<sup>(1)</sup> to be made.

R. R.

(1) The order made by the Court was as follows —

Whereas by an order dated the 16th day of September 1908 stating that on reading the affidavit of J. C. G. Bowen, Acting Public Prosecutor, Bombay, sworn on the 12th day of September 1908, and after hearing the Advocate General of Bombay who applied that a Rule Nisi should be issued against the abovesaid Narasinha Chintaman Kelkar requiring him to show cause, if any he have, why he should not be committed or otherwise dealt with according to law for contempt of Court in respect of an article published by him on pages 349, 350 and 351 of the issue of the newspaper entitled "The Mahratta" and dated the 26th July 1908, containing certain contemptuous and defamatory matters of, and concerning the Honourable Mr. Justice Davar, one of His Majesty's Judges of the High Court, Bombay, and more particularly in respect of the passages set out in the said order. It was ordered that the said Narasinha Chintaman Kelkar should appear before this Honourable Court on Wednesday the 23rd day of September 1908 to show cause why he should not be committed in respect of the said article, and the said Narasinha Chintaman Kelkar attending this Honourable Court on the 23rd day of September 1908 pursuant to the said order, and the affidavits and exhibits filed in this matter being read and upon hearing Mr. Baptista of Counsel for the said Narasinha Chintaman Kelkar and the Honourable the Advocate General of Counsel and this Court, after taking time to consider the matter, being of the opinion that the said Narasinha Chintaman Kelkar has, by publishing the said article in the said issue of the said newspaper, been guilty of a contempt of this Honourable Court, Doth Order that the said Narasinha Chintaman Kelkar do pay a fine of Rs. 1,000 and a further sum of Rs. 200 for costs and do stand committed to His Majesty's Common Prison at the Criminal Side for a period of 14 days from the date hereof and for such further term as may elapse until the said fine and costs imposed upon him by the said order have been paid and until he shall have made suitable submission and apology to this Court.

## APPELLATE CIVIL.

*Before Chief Justice Scott and Mr Justice Dathelcor*

GANGASHANKAR PRABHASHANKAR, PLAINTIFF v BADHUR  
MADHBHAI AND OTHERS, DEFENDANTS \*

1908.  
October 15.

*Dekkhan Agriculturists Relief Act (XVII of 1879), section 7(1)—  
Defendant summoned for examination—Payment of batla.*

It is not necessary to pay *batla* to any agriculturist defendant summoned to be examined under section 7 of the Dekkhan Agriculturists Relief Act (XVII of 1879)

The *batla* is not payable by the plaintiff and the suit is not liable to be dismissed on failure to pay it.

CIVIL reference under section 617 of the Civil Procedure Code (Act XIV of 1892) by J. N. Bhatt, Subordinate Judge of Borsad, in the Ahmedahad District.

The plaintiff filed a suit against Badhur Madhbhai and others in the Court of the Subordinate Judge of Borsad in its Small Cause Jurisdiction. The defendant being an agriculturist, section 7 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) was applicable and an agriculturist summons was ordered to be issued according to Form LXXXVIII at page 201 of the High Court Civil Circulars. The form was prepared in conformity with the provisions of section 7 of the Dekkhan Agriculturists' Relief Act which requires that in every suit the defendant shall be examined as a witness. The plaintiff was required to pay *batla*

\* Civil Reference No 4 of 1903.

(1) Section 7 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) —

7 *Summons to be for final disposal of suit* —In every case in which it seems to the Court possible to dispose of a suit at the first hearing the summons shall be for the final disposal of the suit.

*Court to examine defendant as witness* —In every suit the Court shall examine the defendant as a witness unless, for reasons to be recorded by it in writing, it deems it clearly unnecessary to do so

*Explanation* —The compulsory examination of the defendant shall not be dispensed with merely by reason of the fact that the defendant has filed a written statement.



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for the attendance of the defendant as a witness and he refused to pay it on the grounds that there was no provision in the Civil Procedure Code (Act XIV of 1832) to compel a party to pay *batta* to a witness not summoned at his request, and that it was not necessary at all to pay *batta* to a defendant for being examined by the Court. Owing to the said contentions the Subordinate Judge submitted the following questions for an authoritative determination:—

“(1) Whether it is necessary to pay *batta* to an agriculturist defendant summoned to be examined under section 7 of the Dekkhan Agriculturists' Relief Act?

(2) If it is, whether the same is payable by the plaintiff and whether the suit is liable to be dismissed on failure to pay it?”

The opinion of the Subordinate Judge was in the affirmative on the first question and in the negative on the second question for the following reasons:—

As regards the first question, I have the honour to observe that there are sections in the Civil Procedure Code (Proviso to section 36, section 68, section 120) which authorise a Court to direct that a party shall appear in person. But the consequences of non appearance or dismissal of the suit of the plaintiff are a decree against the defendant or some lesser punishment affecting his interest in the suit (section 107). But there seems to be no provision in the Code that a party's presence shall be enforced by arrest, or proclamation or attachment of property just as there is provision to enforce the presence of a witness summoned to give evidence or produce a document, by warrant, proclamation or attachment (sections 168, 169, 174) if he fails to appear in response to the summons. In this connection the difference between the form of summons to a witness to give evidence (Form No 125, Sch. IV, Civil Procedure Code) and the forms of summonses to a person for examination under section 267, (Form XIII at page 167, High Court Civil Circulars) and to a party for examination under section 287 (Form XXVI at page 169, High Court Civil Circulars) may be noted. In the former there is a penal clause drawing the witness's attention to the consequences of non attendance whereas the latter two forms are silent as to the consequences. This difference in the forms indicates that the appearance under the latter two summonses is not obligatory and supports the view that there is no provision in the Code to enforce the presence of a person summoned otherwise than as a witness. If this view is correct, as I think it is, it is necessary for a Court if it has to secure the appearance of any person, be he a party to the suit or not, to issue a witness summons in the first instance. I am humbly of opinion that the Legislature had in mind this view

of the law when it enacted in section 7 of the Dekkhan Agriculturists' Relief Act that the defendant shall be examined *as a witness*. The words italicised have reference to the procedure to be adopted in securing the defendant's presence.

Whether a party ordered to appear in person and failing, can be proceeded against under section 174, Indian Penal Code, depends on the question whether the process was compulsory. A party failing to appear under the proviso to section 38 or section 66 cannot in my opinion be proceeded against criminally. Even if we assume that a party can be so proceeded against, liability to be criminally tried does not serve the direct purpose of the Court, which is to require his presence for examination. Unless the Court can issue a warrant for arrest, the presence cannot be enforced and for this purpose it becomes necessary to issue a witness summons in the first instance.

The point however does not seem to be free from doubt. For it may be argued contrary to what has been said above (1) that notwithstanding the absence of express provision as to issue of warrant in cases other than those of defaulting witnesses, a Court has inherent power to enforce its process and that the absence of such power would render the issue of summonses under sections such as sections 149, 267, 287 a futile procedure, as is not infrequently the case when a defendant is ordered to appear under section 337, (2) that section 171 seems to imply that it is not necessary to summon a party as a witness if the Court desires to examine him the words being 'if the Court at any time thinks it necessary to examine any person other than a party to the suit, &c.'

The next question is whether the plaintiff can be called upon to pay the *batta*. In the first place, the duty under section 7 of the Dekkhan Agriculturists' Relief Act, is imposed on the Court and not on the party. So it appears awkward that the Court of Justice should demand from the plaintiff *batta* to accomplish that which the Legislature requires of the Court. Besides to push the interests of an agriculturist to the extent of enforcing his presence in Court at the plaintiff's expense could hardly have been contemplated by the Legislature. In the second place under the Civil Procedure Code, *batta* can be demanded from a party only if a witness summons is issued at his instance (section 160). No doubt, there are the words "subject to the rules of the Code, &c., in section 171, but they could not have been meant to make any party pay the *batta* of a Court witness. Much less can a Court by examining a party under section 7, Dekkhan Agriculturists' Relief Act impose on the plaintiff a liability to pay *batta* to the defendant, for section 178 must be read in conjunction with section 160. Thirdly there would have been no necessity for such resolution as is referred to in Circular 27 of the High Court Civil Circulars at p 13, if a party were to be made liable for *batta* of a Court witness. For all these reasons I think that a plaintiff is not liable to pay the *batta* and that his suit cannot be dismissed on failure to pay it.

This question again does not appear to be free from doubt, as it is arguable from an opposite point of view as under —

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1 In section 267 of the Civil Procedure Code, there is an indication of Court's power to throw on any party the expenses of a summons to be issued by it of its own motion. The last words of the section are "and before issuing the summons of its own motion, shall declare the person on whose behalf the summons is so issued."

2 Though the High Court Civil Circulars at p 13 shows that advances are to be made by Government in the first instance, they are to be refunded under the Circular from the amount realised in execution. This means that one of the parties is ultimately to bear the expenses of summons issued by the Court of its own motion. Why not then should the expenses be borne at the commencement in such a case as the present?

*G. N. Thakore (amicus curiæ), for the plaintiff.*

*N. K. Mehta (amicus curiæ), for the defendants.*

SCOTT, C. J.:—The two questions referred for our opinion are —

(1) Whether it is necessary to pay *batia* to any agriculturist defendant summoned to be examined under section 7 of the Dekkhan Agriculturists' Relief Act?

(2) If it is, whether the same is payable by the plaintiff and whether the suit is liable to be dismissed on failure to pay it?

We answer both questions in the negative.

*Order accordingly*

G B B.

## APPELLATE CIVIL.

*Before Chief Justice Scott and Mr Justice Batchelor*

1908.  
November 16.

THE GOVERNMENT PLEADER, HIGH COURT, BOMBAY, APPLICANT,  
v JAGANNATH MORESHVAR SAMANT, OPPOVENT \*

*Bombay Regulation II of 1827, section 56 (1)—Pleader—Misbehaviour—  
Suspension of Sanad—High Court's disciplinary jurisdiction*

Pleaders are a privileged class enrolled for the purpose of rendering assistance to the Courts in the administration of justice. Their position, training

\* Civil Application No 523 of 1908.

(1) Material portion of section 56 of Regulation II of 1827 is as follows:—

A pleader accused of a criminal offence, or guilty of misbehaviour or neglect of duty, shall be liable to be suspended or dismissed.

and practice gives them influence with the public and it is directly contrary to their duty to use that influence for the purpose of bringing the administration of justice into contempt.

A pleader, who presides at a public meeting and therein procures the passing of a resolution contemptuously denouncing or protesting against the conduct of a High Court Judge in passing sentence at a trial at the Criminal Sessions, is guilty of misbehaviour (under section 56 of Bombay Regulation II of 1827).

APPLICATION of the Government Pleader, Bombay, under section 56 of Bombay Regulation II of 1827, for the exercise of the High Court's disciplinary jurisdiction against the opponent with reference to his conduct.

The opponent, who practised as a pleader in the Sholapur District, presided at a public meeting held at Sholapur on the 30th July 1903 to express sorrow for and sympathy with Mr. Tilak for the punishment awarded to him by the High Court of Bombay at a trial in one of the Criminal Sessions in the year 1903. One of the resolutions passed at the meeting reflected upon and denounced the conduct of the Judge who presided at the trial. The Government Pleader of Bombay, thereupon, applied for and obtained a *rule nisi* requiring the opponent to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court in respect of his conduct at the meeting in connection with the said resolution.

*H. C. Ojaya*, (with *G. S. Mulgaumkar*) appeared for the opponent to show cause —We offer absolute and unqualified apology for our conduct. On the merits we submit that we have filed two affidavits which show that the facts were a little different from those mentioned in the affidavits in support of the application. We contend that the term "Misbehaviour" in section 58 of Regulation II of 1827 refers only to professional misconduct *in Court*.

*M. B. Chaudal*, Government Pleader, in person —The opponent's conduct complained of is not only a misbehaviour, but it is a criminal offence, inasmuch as it constitutes a contempt of Court.

The fact that the opponent put up the resolution to the meeting is in itself evidence of misbehaviour.

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SCOTT, C. J. —This matter comes before us on the petition of the Government Pleader which states —

(1) That Mr Jagannath Moreshvar Samant, B A , LL B , is a District Court Pleader, and practises in the Courts of the District and Sessions Judge of Sholapur and Courts subordinate thereto

(2) That on the 30th July last a public meeting was held at Sholapur for the purpose of expressing sorrow for and sympathy with Mr Tilak for the punishment awarded to him, at which nearly a thousand persons attended.

(3) That Mr. Jagannath Moreshvar Samant, Pleader above named, presided at the said meeting and among other things spoke in favour of the 5th resolution passed on the occasion and was in the chair when the said resolution was put to the meeting. The said resolution was in the Marathi language and was to the following effect —“That this meeting contemptuously denounces the Honourable Mr Justice Davar of the Bombay High Court, who at the time of announcing sentence made unchecked and unconnected and unmeaning assertions, which even the enemies of the respected Tilak would have been ashamed to make, and thereby handed our sorrow (sore hearts) ’.

(4) Petitioner submits that such conduct at a Public Meeting in a Pleader in regard to a resolution contemptuously denouncing a Judge of the High Court in respect of his solemn duty as a presiding Judge is not only contempt of Court but is further reprehensible as a misbehaviour falling within the purview of section 56 of Regulation II of 1827, and as such can and ought to be dealt with by this Honourable Court in its Disciplinary Jurisdiction

The petition is supported by affidavits of Mr Barve, Deputy Superintendent of Police and Mr. Dikshit, Sub-Inspector, Police, Sholapur.

In showing cause against the application two affidavits were made use of by counsel for Mr. Samant from which it appears that he did not speak on the 5th resolution beyond asking if there was any objection to it. The Police Officers depose to

words used by him defamatory of Mr Justice Davar, but this is denied by Mr Samant, we will therefore assume that they were not used

It is admitted that Mr Samant presided at the meeting, opened the proceedings with a speech and proposed the first two resolutions. He then called on other speakers to propose the other resolutions and took the sense of the meeting upon them. He attempts to excuse his conduct by pleading that he did not know exactly the terms of the fifth resolution until it was read out by the proposer. It is clear, however, that he not only listened to the speeches on the resolution and to the reading of the resolution without protest but also read out the resolution himself to the meeting and invited it to agree to the terms thereof.

We are of opinion that in so conducting himself at the meeting Mr Samant was guilty of misbehaviour which renders him liable to suspension or removal from the roll of pleaders. Pleaders are a privileged class enrolled for the purpose of rendering assistance to the Courts in the administration of justice. Their position, training and practice give them influence with the public and it is directly contrary to their duty to use that influence for the purpose of bringing the administration of justice into contempt. Mr Samant who owes his position to a Sanad issued by this Court has invited and procured the passing at a meeting of nearly a thousand people of a resolution contemptuously denouncing or protesting against the conduct of a Judge of this Court in passing sentence at a trial at the Criminal Sessions.

This conduct calls for more serious notice than a mere expression of disapproval. We suspend Mr Samant from practice for six months. He must deliver up his Sanad to the District Judge or the Registrar of this Court and may apply for it again in six months' time.

G B R

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## APPELLATE CIVIL

*Before Mr Justice Chandavarkar and Mr Justice Heaton*

1908.  
November 17

SUNDRABAI SAHEB (ORIGINAL OPPONENT NO. 8), APPELLANT, v THE  
COLLECTOR OF BELGAUM (ORIGINAL PETITIONER), RESPONDENT \*

*Practice—Taxation—Pleader's fees—Appeals in Probate Proceedings—  
Scale of costs—Act I of 1846, sec 7*

The taxation of pleader's fees in appeals from probate proceedings should according to a long standing practice of the High Court of Bombay, be valued at Rs 30

APPEAL from an order passed by E. Clements, District Judge of Belgaum.

The Collector of Belgaum as executor of the will of one Lingappa Jayappa, applied to the District Court of Belgaum, for a probate of the will. In this proceeding, Sundrabai (widow of Lingappa) was joined as opponent No 8. This Sundrabai was a minor, and the Deputy Nazir was therefore, appointed her guardian *ad litem*.

Against this order, Sundrabai, represented by one Dayagowda as her guardian, appealed to the High Court.

This appeal was dismissed by the High Court, and the respondent's costs were ordered to be paid by Dayagowda, the guardian of the minor.

In taxing the bill of costs, the office taxed the pleader's fees at Rs. 30, in obedience to a long standing practice in the High Court. The respondent's pleader objected to this taxation and contended that the pleader's fee should be assessed on one-fourth the amount of fees due on the whole subject-matter of the probate petition, viz, Rs. 6,08,02½ under the proviso to section 7 of Act I of 1846.

The Taxing Officer was of opinion that pleader's fee was rightly taxed at Rs 30.

The respondent's pleader thereupon applied to the Court.

*D. A. Khare* for the appellant.

The Government Pleader for the respondent.

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BELGAUM

CHANDAVARKAR, J —The question of law raised in this case by the learned Government Pleader relates to the valuation of Pleader's fees in proceedings for probate. The Collector of Belgaum having applied to the District Judge for probate in respect of the will of Langappa Jayappa Sir Desai of Navalgund, caveats were entered by or on behalf of several persons, one of whom was the deceased's widow. As she was a minor, the Collector applied to the District Judge for the appointment of a guardian *ad litem*. The Judge having by an order appointed the Deputy Nazir of his Court, an appeal was filed in this Court against that order by Dayagowda Leegowda Patil, who described himself as guardian of the minor. The appeal was heard and the order was confirmed with costs, which were directed to be paid by the guardian. The Registrar's office having valued the Pleader's fees at Rs 30 as part of the costs, according to a long-standing practice of this Court, the learned Government Pleader, who had appeared in the appeal for the Collector of Belgaum objected to the valuation, and contended before the Taxing Officer that the Pleader's fees should be calculated in accordance with the last clause of section 7 of Act I of 1846.

The point has been urged before us and its determination depends upon the question whether probate proceedings, both original and appeal, fall within the meaning of a 'regular suit' so as to come within the purview of section 7 of Act I of 1846. The learned Government Pleader contends that they are and relies upon section 83 of the Probate Act (V of 1881). The language however, of that section is far from lending support to the contention. The section does not say that proceedings for probate are 'a regular suit' or that they shall be treated as such for all purposes. It provides that "they shall take as nearly as may be the form of a suit, according to the provisions of the Code of Civil Procedure." This would show that probate proceedings do not, under the ordinary law, fall within the description of a 'regular suit', it is by virtue of section 83 that they are brought within that category, and they are so brought, not in point of fact but only in point of *form*, for the limited purpose of applying to them "as nearly as may be" the provisions



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of the Code of Civil Procedure. These restrictions leave still a difference between "a regular suit" and a testamentary suit. That the Legislature intended the difference to exist is apparent from the special provisions in the Court Fees Act (VII of 1870) for the valuation of Court fee in the case of an application for probate, as distinguished from a suit. As section 83 of the Probate Act brings a probate proceeding within the description of a suit by means of a statutory fiction the purposes of which are expressly limited to the provisions of the Code of Civil Procedure, we think we should be extending the scope of that fiction beyond its legitimate limits if we were to allow the argument of the learned Government Pleader. We hold, therefore, that the long standing practice of the Court as regards the valuation of Pleader's fees in probate proceedings should continue.

R R.

## APPELLATE CIVIL.

*Before Mr Justice Chandavarkar and Mr Justice Heaton.*

1909

November 17.

AMARSANG MAVSANG (ORIGINAL DEFENDANT), APPELLANT, v. JETHA LAL MAGANLAL AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS\*

*Toda Giras Allowance Act (Bombay Act VII of 1897), section 5†—Toda Giras allowance—Attachment and sale in execution of a decree—"Money likely to become due," interpretation—How far can the allowance be attached and sold.*

The plaintiff, who held a money-decree against the defendant, applied for its execution by sale of the *toda giras* allowance which the latter was entitled to receive periodically from the Mamlatdar's Kacheri. The specific prayer in the application was the attachment and sale of the allowance which was to become payable to the defendant during the twenty years following the application. The lower Courts held that the defendant's life interest in the *toda*

\* Second Appeal No. 599 of 1907.

† The section runs as follows:—

"No *toda giras* allowance shall be liable to attachment or sale in execution of a decree

"Provided that any money due or likely to become due to a judgment debtor on account of a *toda giras* allowance may be attached in execution of the decree against him, but such attachment shall not affect any money which becomes due on account of such allowance after such judgment debtor's death."

*giras* allowance computed at its valuation for twenty years, could be attached and sold in execution of the decree —

*Held*, reversing the order, that it is clear from the language of section 5 of the Toda *Giras* Allowance Act (Bombay Act VII of 1887) that it is not the life interest of the judgment debtor in a *toda giras* allowance, but something short of it that is allowed by the Act to be attached

The words "money likely to become due" in section 5 of the Act must be restricted to the case where, for instance during the life time of the judgment debtor, a sum of money is directed by the Collector to be paid to him on account of a *toda giras* allowance not immediately but on a date subsequent to the date of the order of direction, and the judgment debtor dies before that date, and to other cases of a similar character

Under what circumstances money is likely to become due on account of a *toda giras* allowance is a question which cannot be answered exhaustively and must depend on the facts of each case as it arises.

**APPEAL** from the decision of A. C Wild, District Judge of Ahmedabad, confirming the decree passed by B J Desai, Subordinate Judge at Kaira.

#### Proceedings in execution

There was a money decree passed in favour of Jethalal Maganlal against Amarsang Mavsang. In execution of this decree, the decree-holder applied for attachment and sale of the *toda giras* allowance of Rs 303 payable every year to the defendant from the Mamlatdar's Kachari at Mehmabad. The allowance sought to be attached was that which was to become payable to the defendant during the following twenty years

The defendant contended that the *giras* allowance could not be attached and sold, that the allowance for twenty years which the decree holder sought to attach and sell as a debt had not become due, that what was uncertain and dependent upon the pleasure of Government could not be attached and sold, and that the allowance was paid to him for his maintenance.

The Subordinate Judge overruled the defendant's contentions and allowed the execution to be proceeded with. His reasons were stated as follows —

It appears that the allowance in question is of a nature of a *toda giras* allowance (see the copy of the agreement, condition 1). In the case of the *Secretary of State v Khemchand*, 1 L R 4 Bom. 432 it has

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*hak* is not exempted from attachment. Section 5 of Act VII of 1887 (Bombay) exempts the *toda giras* allowance from liability to attachment and sale in execution of a decree but provides that any money due or likely to be due to a judgment debtor may be attached in execution of a decree against him. It is thus evident that the money likely to be due to the judgment debtor is expressly declared liable to attachment. I am, therefore of opinion that the decree holders in this case have a right to proceed in execution against the moneys likely to be due to the judgment-debtor on account of the *toda giras* allowance.

On appeal this order was confirmed by the District Judge on the following grounds —

A *giras* allowance which is a vested right and only to be discontinued under certain conditions is not a merely contingent or possible right or interest and section 266 (k) Civil Procedure Code and the definition of contingent interest to be found in section 21 of the Transfer of Property Act do not come in the decree holder's way.

It is admitted by appellants' pleader that this is a *toda giras* allowance but the ruling in I L R. 4 Bom. 433 of 1880 that a *toda giras* allowance is not exempted from attachment is of a date prior to the enactment of Act VII of 1887. Section 5 of this Act shows that the whole allowance is not attachable, but the proviso to the section permits cash payments likely to be due to the judgment debtor until his death to be attached. Accordingly the 20 annual cash payments which will certainly be paid to judgment debtor unless he first dies may be attached by the decree holder.

In Government Resolution No. 3436 of 5th April 1906 the Legal Remembrancer expresses the opinion that the sale of a *giras* allowance for some years in execution of a decree is allowable under sections 268 and 284 Civil Procedure Code but it is argued that a debt to be attached under that section must be one that is actually due not, as here one that became due from year to year. Here reference is made to I L R. 27 Cal. 39 and 14 Moore's Indian Appeals 40. In the first of these rulings it is laid down that the debt must be an actually existing debt not merely money if at any time or may not become payable at some future time, in the second it is held that the sum attached must not be inchoate but existing and definite. The liability of Government to pay the *giras* allowance is an existing liability though the allowance is to be paid in the future and annually. There is no uncertainty about the payment, and I therefore hold that the allowance comes within the definition of debt in Civil Procedure Code section 266 and may be attached under section 263, Civil Procedure Code.

It is urged that to allow the sale of the allowance would be contrary to public policy as it is given to its recipient for services to be rendered to Government in keeping the peace and preserving order. It would appear however that the allowance is of the nature of compensation to free holders for the loss of the black mail which they used to levy, see I L R. 4 Bom. 432. The

girasia in the sanads exhibits 13 and 14 binds himself not to plunder, and to serve Government if called upon. I understand however that no service is now required from the holders of giras allowances and they certainly in no case will be allowed to plunder. It will therefore not be impossible to permit the present allowance to be attached.

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The judgment debtor appealed to the High Court.

*T. R. Desai* for the appellant. — A *toda giras* allowance is payable on certain conditions according to the terms of the sanad conferring it. The Government have always a right to demand services from the grantee. It can be revoked at any time. It is not certain and definite and the continuance of the allowance in future is not a matter of right. It is not a debt within the meaning of section 266 of the Civil Procedure Code, and so the amount that will accrue due during the next twenty years cannot be attached and sold. Refers to *Haridas Acharya v. Baroda Kishore Acharya*<sup>(1)</sup>, and *Syed Tuffazzool Hossein Khan v. Rughoonath Pershad*<sup>(2)</sup>.

Section 5 of the *Toda Giras Allowances Act* (Bombay Act VII of 1887) expressly excludes the right from attachment and sale. There may be attachment of what is actually due but what is yet to become due in the future cannot be attached. The words "likely to become due" in the section should be strictly construed having regard to the nature of the allowance and the policy of the statute.

*V. G. Ajinkya* for the respondent. — The right to receive allowance is a right pertaining to the judgment debtors. It is definite and regularly payable. The right is not within the proviso of section 5 of the *Toda Giras Allowances Act* (Bombay Act VII of 1887).

CHANDAI ARKAR J. — The respondents having obtained a decree for money against the appellant applied for its execution by sale of the *toda giras* allowance which the appellant was entitled to receive periodically from the *Māmlatdār's Kacheri* at Mehmabad. The specific prayer in the application was the attachment and sale of the allowance which was to become payable to the appellant during the twenty years following the application.

(1) (1899) 2<sup>nd</sup> Cal 33.

(2) (1871) 14 Moo 1 A. 40.

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The appellant resisted the prayer upon the ground that the allowance could not be attached and sold, whether under section 26<sup>n</sup> of the Code of Civil Procedure or under section 5 of Bombay Act No VII of 1887. This objection to the attachment and sale has been disallowed by both the Courts below.

Section 5 of Bombay Act VII of 1887 enacts that "no *toda giras* allowance shall be liable to attachment or sale in execution of a decree, provided that any money due or likely to become due to a judgment debtor on account of a *toda giras* allowance may be attached in execution of the decree against him, but such attachment shall not affect any money which becomes due on account of such allowance after such judgment debtor's death." The words "likely to become due" in this section have been construed by both the lower Courts to apply to the life interest of the holder of a *toda giras* allowance. Accordingly they have held that such life interest, computed at its valuation for 20 years, can be attached and sold in execution of a decree against the holder.

The difficulty in accepting this view of the lower Courts lies in the difference in point of language between section 5 and the preceding section. The latter (section 4 of the Act) provides that "no mortgage, charge or alienation of a *toda giras* allowance or of any part thereof, or of any interest therein, by any recipient of the same, shall be valid as to any time beyond such recipient's natural life." That is, a private alienation by the recipient shall be valid to the extent of his life interest but not beyond it. If the Legislature had intended the same to be the case as regards an alienation by way of attachment and sale in execution of a decree, similar phraseology would have been used in section 5. Nothing could have been simpler in that case than for the Legislature to have said in section 5 that such attachment and sale shall not be valid beyond the natural life of the holder of the allowance. But so far from using any such language, which would have been apt to show that that was their intention the Legislature have used language in the enacting part of section 5 which prohibits in absolute terms the attachment and sale of a *toda giras* allowance in execution of a decree, and then in the proviso which follows they make an exception in the case of

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"moneys due or likely to become due" to the judgment debtor. But even as to such moneys the proviso says that the right to attach and sell in execution of a decree shall fail if they become due on account of such allowance "after such judgment debtor's death." The meaning of this is obvious. Suppose, to take one of several cases that might be put in illustration, during the lifetime of the judgment debtor, a sum of money is directed by the Collector to be paid to him on account of a *toda giras* allowance not immediately but on a date subsequent to the date of the order of direction, the judgment-debtor however, dies before that date. Now, under the ordinary law, notwithstanding the death, when the date fixed for payment arrives, the money would become payable to the estate of the deceased as part of his assets, and it could be attached in execution of a decree against him, as a portion of his life-interest in the allowance. But the proviso to section 5 alters the ordinary law and provides that even in such a case there shall be no attachment.

It seems clear from this language of section 5 that it is not the life interest of the judgment-debtor in a *toda giras* allowance but something short of it that is allowed by the Act to be attached. The words "money likely to become due" must therefore, be restricted to such a case as the one we have mentioned above in illustration and other cases of a similar character. Under what circumstances money is likely to become due on account of a *toda giras* allowance is a question which cannot be answered exhaustively and must depend on the facts of each case as it arises.

For these reasons we must reverse the decree appealed from and remit the present *darhast* for disposal according to law with reference to the foregoing observations. Costs to abide the result.

*Decree reversed.*

R. R.

## APPELLATE CIVIL.

*Before Mr Justice Chandalarakar and Mr Justice Heaton*1908.  
November 23

SUBRAYA VITHAL NAIK (ORIGINAL DEFENDANT No. 1), APPELLANT, v  
NAGAPPA SUBBAYA SHANBHOG AND OTHERS (ORIGINAL PLAINTIFF  
AND DEFENDANTS NOS 2 TO 4), RESPONDENTS \*

*Hindu law—Debts—Son's liability to pay father's debts—Attachment of son's  
share in family property—Father's power to deal with the attached share—  
Civil Procedure Code (Act XIV of 1882), section 276*

When the right, title and interest of a Hindu son in joint ancestral property has been attached in execution of a decree against him and its private alienation by him has been prohibited by an order of the Court under section 276 of the Code of Civil Procedure his father is deprived of the power of alienation of that interest in satisfaction of his own debts

SECOND appeal from the decision of C C Boyd District Judge of Kánara, amending the decree passed by K R Natu, Subordinate Judge at Kumta

One Anant Subbaya (defendant No 2) and his two sons Waman and Anant (defendants Nos 3 and 4) together constituted a joint Hindu family, which owned an ancestral shop

A money decree was passed against Waman in a matter which concerned him. In execution of this decree Waman's share in the shop was attached on the 8th March 1900 and it was subsequently sold to the plaintiff at a Court sale on the 18th October 1900

Meanwhile on the 20th August 1900, Waman's father Anant (defendant No 2) sold the whole shop to Subbaya (defendant No 1) in satisfaction of a family debt of Rs 700

The plaintiff brought the present suit for recovering, by partition, Waman's one-third share in the family shop

In the first Court, the plaintiff's claim was decreed. The reasons were as follows —

The attachment of Waman's one third share in the shop and its site took place in Darkhast No 454 of 1899 on the 8th March 1900. The sale to defendant 1 took place on the 20th August 1900. It is not denied and does also appear from the deposition of defendant 2 that the shop and its site form part

\* Second Appeal No. 835 of 1907

of the ancestral property of defendants 3 to 4. Hence evidently defendant 4 had a third share in it. The sale to defendant 1 of the attached third share in the shop is illegal under section 276 of the Civil Procedure Code (*vide* I L R 30 Bom 337). The sale in respect of the third share of Waman is illegal under the abovementioned section 276 although the Court sale took place on the 18th October 1900 the attachment was effected on the 8th March 1900. Plaintiff Nagappa's claim is enforceable under the attachment as provided in section 276.

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On appeal this decree was confirmed by the District Judge with a slight variation.

There was an appeal to the High Court.

*Alikantha Atmaram* for the appellant.—The provisions of section 276 of the Civil Procedure Code (Act XIV of 1852) do not apply to the sale by the father. The section must be read with section 274 of the Code which expressly prohibits alienations only by the judgment-debtor and forbids any persons from taking transfer from the judgment debtor. Here the alienor is not the judgment debtor, and therefore the sale is not affected by section 276.

Further the father's power of alienation is independent of the sons. In the case of *Mussamut Nanomi Babuassu v. Modun Mohun*<sup>(1)</sup>, their Lordships of the Judicial Committee hold that as a matter of fact the son's vested right by birth is destroyed by the obligation upon him to pay the father's debts.

*S. S. Pillar* for respondent No. 1.—The son's share in the house was admittedly under attachment at the date of the sale of the whole to the appellant by the father. The effect of the attachment was to arrest the power of the father to make any alienation of it see *Malho Parshad v. Uchrbau Singh*. The father's power of alienation is not independent of the son. He cannot alienate it without the authority of the son either express or implied. When the share is once attached, the son himself cannot alienate it much less could the father do so. The attachment constitutes a valid charge on the land see *Suraj Bunsu Koer v. Sheo Proshad Singh*<sup>(2)</sup>. It prevents even the right of survivorship in the joint family. The attachment under section 276 like the rule of *lis pendens* makes the alienation subservient to the

(1) (1885) L R 13 I A 1.

(2) (1890) L R 17 I A 194, pp. 196, 197.

(3) (1878) L R 6 I A 88.



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rights of the attaching creditor. The alienation is void as against all claims enforceable under the attachment

*Sumitra S Hathangdi* for respondent No 2

CHANDAN ARKAR, J —Under the Hindu law a father has the right to sell or mortgage ancestral property, including the interests therein of his sons, in satisfaction of his antecedent debts, provided those debts were not contracted for immoral or illegal purposes. This right to dispose of the ancestral property so as to include and affect the shares of the sons arises, according to Hindu law, in virtue of the pious obligation of the sons to pay the debts of the father, which were not illegal or immoral. In other words when the father alienates the property, he exercises the power of alienation which the sons would have exercised in discharge of their pious duty which they owed to him. He is virtually alienating the property for them and on their behalf in discharge of their duty in accordance with the power given to him by Hindu law. When once this principle of Hindu law is grasped, it follows that when the right, title and interest of a Hindu son in joint ancestral property has been attached in execution of a decree against him and its private alienation by him has been prohibited by an order of the Court under section 276 of the Code of Civil Procedure his father is deprived of the power of alienation of that interest in satisfaction of his own debts. And that is so, because, the son's power of alienation having been taken away by the Court there is no power left in him on which the father's power could rest after the Court's order. For these reasons we think the lower Court is right and its decree is confirmed with costs.

*Decree confirmed*

R. R.

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1908

SUBBAYYA

v

NAGAPPA.

rights of the attaching creditor. The alienation is void as against all claims enforceable under the attachment

*Sumitra S. Hattiangdi* for respondent No. 2.

CHANDAVARKAR, J. —Under the Hindu law a father has the right to sell or mortgage ancestral property, including the interests therein of his sons, in satisfaction of his antecedent debts, provided those debts were not contracted for immoral or illegal purposes. This right to dispose of the ancestral property so as to include and affect the shares of the sons arises, according to Hindu law, in virtue of the pious obligation of the sons to pay the debts of the father, which were not illegal or immoral. In other words when the father alienates the property, he exercises the power of alienation which the sons would have exercised in discharge of their pious duty which they owed to him; he is virtually alienating the property for them and on their behalf in discharge of their duty in accordance with the power given to him by Hindu law. When once this principle of Hindu law is grasped, it follows that when the right title and interest of a Hindu son in joint ancestral property has been attached in execution of a decree against him and its private alienation by him has been prohibited by an order of the Court under section 276 of the Code of Civil Procedure his father is deprived of the power of alienation of that interest in satisfaction of his own debts. And that is so, because, the son's power of alienation having been taken away by the Court, there is no power left in him on which the father's power could rest after the Court's order. For these reasons we think the lower Court is right and its decree is confirmed with costs.

*Decree confirmed*

R. R.

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	2a 6p (1a)
	1a 6p (1a)
	3a (1a)
	1a 13 (1a)
	4a (1a)
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	1a 13 3a
	4a 7a (1a)
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Act V of 1873 (Government Savings Bank) as modified up to 1st April 1903	3a 6p (1a)
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Act XV of 1874 (Laws Local Extant) as modified up to 1st October 1895	1a 1a
Act IX of 1875 (Land Revenue)	11a 1a
	11a 1a
	10 1a

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	1808 Re 1 10a (3a)
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	6a (2)
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	February
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1893	

Act VI of 1888 (Births Deaths and Marriages Registration) as modified up to 1st July 1903

Act XIV of 1887 (Indian Marine) as modified up to 15th February 1899

Act V of 1888 (Inventions and Designs) as modified up to 1st July, 1903

Act I of 1889 (Metal Tokens) as modified up to 1st April 1904

Act VII of 1889 (Succession Certificates) as modified up to 1st December, 1903

March 1895

April 1901

1st June 1900, with

an Index

Act X of 1890 (Press and Registration of Books) as modified up to 1st December 1903

showing the Schedules as

1st June 1900, with

1st June 1900, with

1st June 1900, with

1st June 1900, with

1st June 1900, with

1898

1898

1898

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Act XV of 1903 (Extradition), as modified up to 1st December, 1904	5a 6p (1a)
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Regulation I of 1895 (Kachin Hill Tribes), as modified up to 1st April, 1902	6a (1a)

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Act XX of 1847 (Copyright) as modified up to 1st May, 1893	In Urdu 1a 3p (1a)
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Act XVIII of 1850 (Judicial Officers Protection) with foot notes	In Urdu 1a 6p (1a)
Ditto	In Nagri 6p (1a)
Act XXXIV of 1850 (State Prisoners), as modified up to 30th April 1903	In Urdu 6p (1a)
Ditto	In Nagri 6p (1a)
Act XXX of 1852 (Naturalization), as modified up to 1st December, 1902	In Urdu 6p (1a)
Ditto	In Nagri 6p (1a)
Act XII of 1855 (Legal Representatives Suits), as modified up to 1st November, 1904	In Urdu 3a. (1a)
Ditto	In Nagri 3p (1a)
Act XIII of 1855 (Fatal Accidents), as modified up to 1st December, 1903	In Urdu 6p (1a)
Ditto	In Nagri 6p (1a)
Act XX of 1856, as modified up to 1st November, 1903	In Urdu 2a 6p (1a)
Ditto	In Nagri 2a 6p (1a)
Act XXXIV of 1858 [Lunacy (Supreme Courts)] as modified up to 30th April, 1903	In Urdu 1a. (1a)
Ditto	In Nagri 1a. (1a)
Act XXXV of 1858 [Lunacy (District Courts)] as modified up to 30th April, 1903	In Urdu 1a. (1a)
Ditto	In Nagri 1a. (1a)
Act XXXVI of 1858 (Lunatic Asylums), as modified up to 31st May 1902	In Urdu 1a 6p (1a)

Act XIII of 1859 (Workman's Breach of Contract), as affected by	
Act XVI of 1874	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act IX of 1860 [Employers and Workmen (Disputes)] as modified up to 1st December, 1904	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act XLV of 1860 (Penal Code) as modified up to 1st April 1903	In Urdu Po 15 (5a)
Ditto	In Nagri Re 15 (5a)
Act V of 1861 (Police) as modified up to 7th March, 1903	In Urdu 2a 9p (1a)
Ditto	In Nagri 2a 9p (1a)
Act XVI of 1861 (State carriages) as modified up to 1st February, 1898	In Urdu 1a 3p (1a)
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Act III of 1864 (Fore-guards) as modified up to 1st September, 1906	In Urdu 1a (1a)
Ditto	In Nagri 1a (1a)
Act VI of 1864 (Whipping) as modified up to 1st April, 1900	In Urdu 1a 6p (1a)
Ditto	In Nagri 1a 6p (1a)
Act III of 1865 (Carriers) as modified up to 31st May 1903	In Urdu 9p (1a)
Ditto	In Nagri 9p (1a)
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Ditto	In Nagri 1a 9p (1a)
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Ditto	In Nagri 9p (1a)
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Act IX of 1872 (Contract), as modified up to 1st September, 1899	In Urdu 9a 6p (3a)
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Act XV of 1872 (Christian Marriage), as modified up to 1st April, 1891	In Urdu 1a (2a)
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Act V of 1873 (Government Savings Bank), as modified up to 1st April, 1903	In Urdu 9p (1a)
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Act I of 1877 (Specific Relief) as modified up to 1st February, 1904	In Urdu 4a 6p (1a 6p)
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Act I of 1878 (Opium), as modified up to 1st December 1899	In Nagri 1a 6p (1a)
Act VII of 1878 (Forests) as modified up to 1st December, 1903	In Urdu 4a (1a)
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Act XI of 1878 (Arms), as modified up to 1st May, 1904	In Urdu 2a (1a)
Ditto	In Nagri 2a (1a)
Act XVII of 1878 (Northern India Ferries), as modified up to 1st June, 1903	In Urdu 2a (1a)
Ditto	In Nagri



Act XVIII of 1870 (Legal Practitioners), as modified up to 1st May, 1896	In Urdu 2a. 6p (1a.) In Nagri 2a. 6p (1a.)
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Act VII of 1886 (Bills Valuation)	In Urdu 3p (1a.) In Urdu 3p (1a.)
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Act XII of 1887 (Bengal, North West Provinces and Assam Civil Courts)	In Urdu 1a. 3p (1a.) In Nagri 1a. 3p (1a.)
Act XIV of 1887 (Indian Marine), as modified up to 15th February, 1890	In Urdu 3a. 6p (1a.) In Nagri 3a. 6p (1a.)
Act XV of 1887 (Burmah Military Police)	In Urdu 3p (1a.) In Nagri 3p (1a.)
Act XVIII of 1887 (Allahabad University)	In Urdu 3a. (1a.) In Urdu 3p (1a.)
Act III of 1888 (Police), as modified up to 1st March, 1897	In Urdu 6p (1a.) In Nagri 6p (1a.)
	(as passed)



Act VIII of 1898 (Inland Bonded Warehouses)	In Urdu 3p (1a)
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Act XII of 1898 (Excise) as modified up to 1st August 1905	In Nagri 3a 3p (1a)
Act I of 1897 (Act XXVII of 1850 Amendment)	In Urdu 3p (1a)
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Act II of 1897 (Criminal Tribes Act Amendment)	In Urdu 3p (1a)
Act III of 1897 (Epidemic Diseases)	In Urdu 3p (1a)
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Act IV of 1897 (Fisheries)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
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Act VII of 1897 (Indian Emigration Act Amendment)	In Urdu 3p (1a)
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Ditto	In Nagri 3p (1a)
Act X of 1897 (General Clauses)	In Urdu 1a (1a)
Ditto	In Nagri 1a (1a)
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Ditto -	In Nagri 3p (1a)
Act XV of 1897 (Cantonments)	In Urdu 3p (1a)
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Ditto	In Nagri 3p (1a)
Act III of 1898 (Lopore)	In Urdu 6p (1a)
Ditto	In Nagri 6p (1a)
Act IV of 1898 (Indian Penal Code Amendment)	In Urdu 3p (1a)
Act V of 1888 (Code of Criminal Procedure), as modified up to 1st April, 1890	In Urdu Rs 1-4 (Sa)
Ditto	In Hindi Rs 1-6 (Sa)
Act VI of 1898 (Post Office)	In Urdu 2a (1a)
Ditto	In Nagri 2a (1a)
Act IX of 1898 (Live stock Importation)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act X of 1898 (Indian Insolvency Rules)	In Urdu 3p (1a)
Act I of 1899 [Indian Marine Act (1887) Amendment]	In Urdu 6p (1a)
Ditto	In Nagri 6p (1a)
Act II of 1899 (Stamp), as modified up to 31st August, 1905	In Urdu 7a 6p (1a 6p)
Ditto	In Nagri 7a 6p (1a 6p)
Act III of 1899 (Prisoners), as modified up to 1st March, 1905	In Urdu 2a 3p (1a)
Ditto	In Nagri 2a 3p (1a)
Act IV of 1899 (Government Buildings)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act VII of 1899 (Indian Steam vessels Act (1884) Amendment)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act VIII of 1899 (Petroleum)	In Urdu 3p (1a)
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Act IX of 1899 (Arbitration)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act XI of 1899 (Court fees Amendment)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act XII of 1899 (Currency Notes Forgery)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act XIV of 1899 (Tariff Amendment)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act XVII of 1899 (Indian Registration Amendment)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act XVIII of 1899 (Land Improvement Loans Amendment)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act XX of 1899 (Presidency Banks)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act XXI of 1899 (Central Provinces Tenancy Amendment)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act XXIV of 1899 (Central Provinces Court of Wards)	In Urdu 1a 3p (1a)
Ditto	In Nagri 1a 3p (1a)
Act I of 1900 (Indian Articles of War Amendment)	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)
Act IV of 1900 [Indian Companies (Branch Registers)]	In Urdu 3p (1a)
Ditto	In Nagri 3p (1a)

Act IX of 1900 (Amendment of Court fees Act, 1870)	...	...	1a Urdu. 3p (1a.)
Ditto.			1a Nagri 3p (1a.)
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Ditto			1a Nagri 3p (1a.)
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Ditto			1a Nagri 3p (1a.)
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Ditto			1a Nagri 3p (1a.)
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Ditto			1a Nagri 3p (1a.)
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Ditto			1a Nagri 3p (1a.)
Act III of 1903 (Electricity)	...	...	1a Urdu 2a 6p (1a 6p)
Ditto			1a Nagri 2a 6p (1a 6p)
Act V of 1903 (Ports)	...	...	1a Urdu 3p (1a.) 2a (6p)
Ditto			1a Nagri 3p (1a.)
Act VII of 1903 (Works of Defence)	..	..	1a Urdu 1a 3p (1a.)
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Ditto			1a Nagri 9p (1a.)
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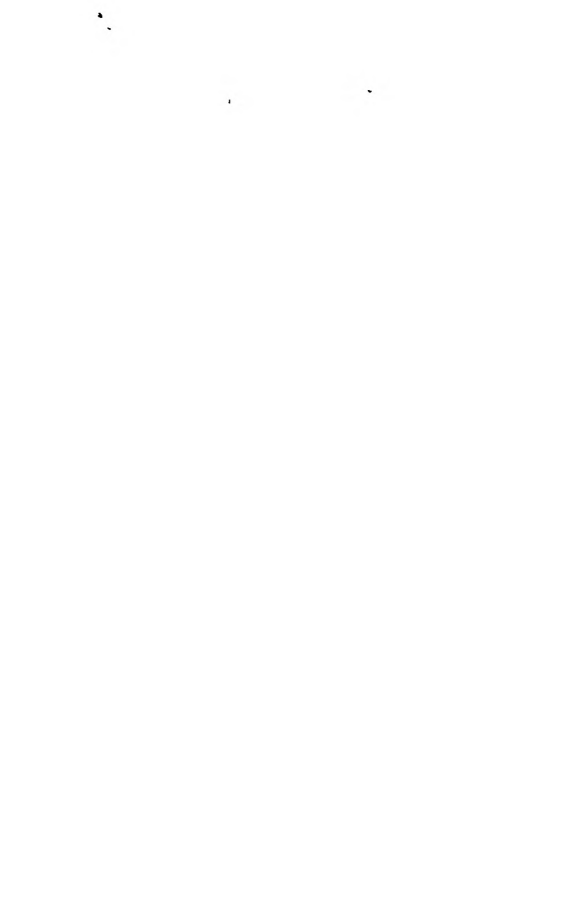
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**ADVERSE POSSESSION**—*Adverse possession between tenants-in-common—If that constitutes adverse possession—Acts of exclusive possession—Ouster* The property in dispute belonged jointly to two brothers (t and D. The plaintiffs obtained a decree on a mortgage bond against D. as manager of the family, and in execution of the decree the property was sold to V. When V. sought to take possession of the property he was obstructed by G. and he had to file a suit against G. to remove the obstruction. In that suit it was held on the 29th November 1886 that V. was entitled to recover possession by partition of a moiety of the property. The application to execute this decree was sent to the Collector who on the 11th of December 1895 effected the partition and made over symbolical possession to V. of his share. This share was sold to plaintiff on the 18th March 1899. Meanwhile, on the 4th October 1894, G. sold the whole of the property to defendant's father. The plaintiff eventually sued on the 4th October 1906, to recover possession of the property from defendant. The latter contended that this claim was barred by adverse possession.

*Held*, that to entitle the defendant to add to the period of his own adverse possession (which was admittedly less than 12 years before the date of the

... .. shown that the  
... .. as the decree  
... .. during the period  
... .. re-forming the  
... .. nted them from  
... .. a new class of

The question of adverse possession as between tenants-in-common depends not on a severance of the tenancy-in-common by partition but on exclusive occupation by one co-tenant amounting to an ouster of the other.

AMRITA RAJJI v. SHRIDHAR NARAYAN

(1907) 33 P.W. 317

**ATTACHMENT**—*Mores deere*—*I recuher*—*Attachment and sale of property mortgaged with possession to a third person*—*Act on purchase by judgment creditor with leave of*—*to confirmation of*—*mortgage is fraudulent*—*stoppage*—*(Act VII of 1882)* .. .. .

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*Bydlia Pershad v Balloo Singh* (1884) 21 Cal 818 followed  
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*Datta v Chitandas* (1885) 11 Bom 73 distinguished  
Sec SUITS VALUATION ACT .. .. . 707

*Hari Sailer Datta v K. L. Aun v Patra* (1900) 32 Cal 731 followed  
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*Sangapa v. Sangapa* (1878) 2 Bom. 476, referred to  
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CAUSES OF ACTION, MISJOINDER OF—*Lands situate at different villages and in possession of different persons under different titles—One suit to recover possession of the lands—Interlocutory judgments against different defendants—Final judgment for possession to be reserved till the conclusion of the trial—Civil Procedure Code (Act XIV of 1882), sec. 28.*  
See CIVIL PROCEDURE CODE ... 293

CIVIL PROCEDURE CODE (ACT XIV OF 1882), sec. 111—*Shankaracharya of Sharada Math* ...

of that Math

The lower Court made a declaration that the defendant was not entitled to call himself a Shankersacharya of the Jyotir Math or of a branch of it at Dholka and an injunction against the defendant so styling himself and claiming or receiving offerings. The claim for an account and recovery of offerings received by the defendant was not allowed as the offerings might or might not have been made to the plaintiff.

On appeal by the defendant,

was then or interfered with

For interference with mere dignity no suit can be maintained

For voluntary offerings received no suit will lie

*Sri Sunkur Bharti Swami v. S. Ila Lingayah Charanti* (1843) 3 Moo. I A 114, *Singapa v. Sangapa* (1878) 2 Bom. 476, and *Ravi v. Shieram* (1862) 6 Bom. 116, referred to

*See v. Desai* (1793) 6 T. R. 641, followe

MADHURDAS PARVAT C. SHRI SHANKARACHARYA ... (1903) 23 Bom. 275













*Held* further, that the plaintiffs under their purchase were not purchasers of merely the equity of redemption and were not bound by estoppels which would have bound the judgment debtor. There is nothing to prevent such a purchaser from benefiting by the clearance of any claim upon the property even if he has himself to sue to procure it. He may alike displace a fraudulent and redeem an honest mortgage.

GANESH v. PUTSHOTTAM . . . . . (1903) 33 Bom 311

COURT-FEES—*Suit for declaration and consequential relief—Valuation—Jurisdiction—Value of the relief stated in the plaint—Suits Valuation Act (VII of 1887), sec. 8*

See SUITS VALUATION ACT . . . . . 307

DECLARATION, SUIT FOR—*Valuation—Court fees—Jurisdiction—Value of the relief stated in the plaint—Suits Valuation Act (VII of 1887), sec. 8*

See SUITS VALUATION ACT . . . . . 307

DECREE—*Execution—Civil Procedure Code (Act XIV of 1882) sec. 211—*

Where a decree nisi contemplated an account being taken, but was silent as to how that account was to be taken, and the Court has declined to modify the decree by inserting such a direction, it would be out of the question to compel a party in execution proceedings to do that which he is not directed to do by the decree.

*Ajudhia Pershad v. Baldeo Singh* (1891) 21 Cal. 818 and *Nandran v. Lalji* (1897) 22 Bom 771, followed.

SIR JEHANCIH COWANJI v. THE HOFF MILLS, LIMITED. (1906) 23 B m 273

EQUITY OF REDEMPTION—*Money decree—Execution—Attachment and sale of property mortgaged with possession to a third person—Auction—release by judgment creditor with leave of Court subject to mortgage—Suit by judgment creditor prior to confirmation of sale and satisfaction of decree for a declaration that the mortgage was fraudulent and without consideration—Purchase—Estoppels binding upon judgment-debtor—Civil Procedure Code (Act XIV of 1882) secs. 278, 282, 283 and 297*

See CIVIL PROCEDURE CODE . . . . . 311

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EXCUTION—*Decree—Civil Procedure Code (Act XIV of 1882) sec. 211—Transfer of property—*

Where a decree nisi contemplated an account being taken, but was silent as to how that account was to be taken, and the Court has declined to modify

the decree by inserting such a direction it would be out of the question to compel a party in execution-proceedings to do that which he is not directed to do by the decree.

*Ayudha Pershad v. Baldeo Singh* (1891) 21 Cal 818 and *Nandram v. Babay* (1877) 22 Bom 771, followed.

*Sir Jhangir Cowasji v. The Hoff Mills, Limited* .. (1908) 33 Bom 273

283 and 287.

See CIVIL PROCEDURE CODE .. .. 311

HINDU

*Held*, that the second son was not entitled to any share in the property.

*SHIVAJIRAO v. VASANTRAO* .. .. (1908) 33 Bom 207

INJUNCTION—*Suit for declaration and consequential relief—Valuation—Court-fees—Jurisdiction—Value of the relief stated in the plaint—Suits Valuation Act (VII of 1887), sec 8*

See SUITS VALUATION ACT .. .. 307

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JOINT HINDU FAMILY—*Release by a coparcener—Right of coparcener's afterborn son to claim a share with his brothers—Hindu Law*

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See SUITS VALUATION ACT .. .. 307

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## ORIGINAL CIVIL.

*Before Mr Justice Knight*SHIVAJILAO MADHAVRAO AND ANOTHER PLAINTIFFS, v  
VASANTRAO MADHAVRAO, DEFENDANT.\*1903,  
July 20*Hindu Law—Joint Hindu family—Release by a coparcener—Right of coparcener's afterborn son to claim a share with his brothers*

M, a member of a joint Hindu family being involved in debt, gave a release of his share to his father in consideration amongst other things of a sum of Rs. 5000. At the time of this release M had one son living. On this son suing the coparcenary for partition it was held (in Suit No. 473 of 1901) that he was entitled to a share in the joint family property and that the release acted only against his father personally. After the date of this decree M had another son born who sued the first son to recover from him a moiety of the sum allotted to the first son on partition.

*Held*, that the second son was not entitled to any share in the property.

One Vithoba Mankojee, a Hindu inhabitant of Bombay, and the great grandfather of the first plaintiff and of the defendant, herein acquired considerable moveable and immoveable property under the will and codicil of his grandfather Kashinath Bhikhaji. This said will and codicil were afterwards held void and inoperative as dealing with property which was ancestral in the hands of Kashinath Bhikhaji.

Vithoba Mankoji died on the 22nd of April 1873 leaving him surviving one son Kashinath Vithoba and two grandsons Ganpatrao Kashinath and Madhavrao Kashinath. The said Kashinath and his said son and grandsons contracted to live together after the death of the said Vithoba as an united Hindu family joint in food, worship and estate. The first plaintiff and the defendant are the sons of the said Madhavrao Kashinath. The defendant was born in 1884. Kashinath Vithoba died on the 23rd June 1901.

On the 20th January 1883 Madhavrao Kashinath became involved in debt and in consideration of his father paying the sum of Rs. 5,000 in settling his debts and for various other

- MONEY-DECREE**—*Execution—Attachment and sale of property mortgaged with possession to a third person—Auction purchase by judgment-creditor with leave of Court subject to mortgage—Suit by judgment-creditor prior to confirmation of sale and satisfaction of decree for a declaration that the mortgage was fraudulent and without consideration—Purchase—Equity of redemption—Stoppage in time upon judgment deltor—Civil Procedure Code (Act XIV of 1882) secs 278, 292, 299 and 257*  
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- SUITS VALUATION ACT (VII OF 1887), SEC 8**—*Suit for declaration and consequential relief—Valuation—Court fees—Jurisdiction—Value of the relief stated in the plaint [ In a suit for declaration and consequential relief (injunction) with respect to land the Court must accept the value of the relief stated in the plaint for the purpose both of the Court fees and jurisdiction.*  
*Har Sanker Dutt v. Kali Kumar Patra (1905) 32 Cal 734, followed.*  
*Dayaram v Gordhandas (1906) 31 Bom 73 distinguished*  
*VACHHANI v VACHHANI* . . . . . (1908) 33 Bom 307
- TRANSFER OF PROPERTY ACT (IV OF 1882), SEC 93**—*Decree—Execution—Civil Procedure Code (Act XIV of 1882), sec 244*  
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## ORIGINAL CIVIL.

*Before Mr Justice Knight.*

SHIVAJILAO MADHAVRAO AND ANOTHER, PLAINTIFFS, v  
VASANTRAO MADHAVRAO, DEFENDANT \*

1903.

July 20.

*Hindu Law—Joint Hindu family—Release by a coparcener—Right of coparcener's afterborn son to claim a share with his brothers*

M, a member of a joint Hindu family being involved in debt, gave a release of his share to his father in consideration amongst other things of a sum of Rs. 5000. At the time of this release M had one son living. On this son suing the coparcenary for partition it was held (in Suit No. 473 of 1901) that he was entitled to a share in the joint family property and that the release acted only against his father personally. After the date of this decree M had another son born who sued the first son to recover from him a moiety of the sum allotted to the first son on partition.

*Held* that the second son was not entitled to any share in the property.

One Vithoba Mankojee, a Hindu inhabitant of Bombay, and the great-grandfather of the first plaintiff and of the defendant, herein acquired considerable moveable and immoveable property under the will and codicil of his grandfather Kashinath Bhikharji. This said will and codicil were afterwards held void and inoperative as dealing with property which was ancestral in the hands of Kashinath Bhikharji.

Vithoba Mankoji died on the 22nd of April 1873 leaving him surviving one son Kashinath Vithoba and two grandsons Ganpatrao Kashinath and Madhavrao Kashinath. The said Kashinath and his said son and grandsons contracted to live together after the death of the said Vithoba as an united Hindu family joint in food, worship and estate. The first plaintiff and the defendant are the sons of the said Madhavrao Kashinath. The defendant was born in 1884. Kashinath Vithoba died on the 23rd June 1901.

On the 20th January 1883 Madhavrao Kashinath became involved in debt and in consideration of his father paying the sum of Rs. 5,000 in settling his debts and for various other





from the family. It was a personal relinquishment. The rest of the family was joint, that is why Vasant Rao was allowed one half and not one quarter. The Appeal Court declares the release is for the benefit of the whole family, yet it has operated solely for the benefit of Vasant Rao. In effect it is a gift by the father to his son and that with the consent of the co-parceners. Viewed in that light the case nearly approaches *Rai Bishen Chand v. Mussumat Amalda Kher*<sup>(1)</sup> and so long as the father has not kept enough to give an afterborn son as much as the earlier born sons received, an equal share must be made good to the afterborn son by the brothers. *Krishna v. Sami*<sup>(2)</sup>, *Chengama Nagudu v. Munisami Nayudu*<sup>(3)</sup>.

Where the father leaves nothing to himself and the afterborn son has no source from which to maintain himself he can claim from the separated brothers a share equal to theirs.

Our second point is that the judgment of the Privy Council says that the release enures for the benefit of the other branch. The judgment treats Madhav Rao as civilly dead but this does not break up the coparcenary. Madhav Rao is personally disqualified by the release but this does not prevent the son of a disqualified person from inheriting property. The afterborn son is in the same position as his brothers.

*Sethna* (with *Selalrad*) for defendant. — *Krishna v. Sami*<sup>(2)</sup> has not been followed in Bombay. See *Bayya v. Pandurang*<sup>(4)</sup>, *Bal-Krishna Trimbak Tendulkar v. Savitribai*<sup>(5)</sup>, *Bailur Krishna Rao v. Lakshmana Shanbhogue*<sup>(6)</sup>, *Nawal Singh v. Bhagwan Singh*<sup>(7)</sup>, *Vir-Mitrodaya*, p. 492.

KNIGHT, J. — This suit is a pendant to the case of *Hatant Rao v. Anand Rao*<sup>(8)</sup> decided by the Appellate Court in September 1901, and subsequently by the Privy Council<sup>(9)</sup>.

(1) (1884) L. 11 T. A. 164.

(2) (1885) 9 Mad. 61.

(3) (1895) 20 Mad. 75.

(4) (1887) 6 B. 1, 616.

(5) (1878) 3 Bom. 54.

(6) (1881) 4 Mad. 302.

(7) (1882) 4 All. 477.

(8) (1901) 6 Bom. L. R. 275.

(9) (1901) 3 B. L. 1, 17.

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considerations executed a release of all his interest in the family property in favour of his father. Ultimately Madhavrao Kashinath became insolvent in or about the year 1892 and by virtue of the vesting order under section 7 of the Insolvent Act all his estate became vested in the Official Assignee.

In 1901, Vasantrao Madhavrao, the defendant herein, filed a suit in the High Court of Judicature at Bombay, being Suit No 423 of 1901, for partition of certain joint and ancestral properties. The Appeal Court at Bombay reversing the decision of Tyabji, J., held that the properties were joint and ancestral and that the said Vasantrao Madhavrao was entitled to a half share therein.

The Appeal Court further remarked "Madhavrao has released his share and in answer to an enquiry from the Court it was stated that neither he nor his assignee in insolvency questions the release as against himself. But it follows that the release must be treated not as for the benefit of Kashinath alone but of the co-parcenary and so the shares must be determined as though Madhavrao was dead."

The Privy Council confirmed the decree of the Appellate Court on the 8th February 1907.

After the date of the decree of the Appellate Court and pending the appeal to the Privy Council the first plaintiff was born to the said Madhavrao on the 8th May 1905, and in this suit claims a share in the moiety of the properties to which the defendant has been declared entitled.

By a consent Judge's order dated the 11th April 1908 the suit was directed to be set down for trial of the following preliminary issue —

"Whether the first plaintiff is entitled to any and what portion of the defendant's share of the properties to which he is entitled in Suit No 423 of 1901 in the plaintiff's name."

and *Dastur*, for the plaintiff — There has been no partition of the joint family property before the death of the defendant. In 1889 all that happened was that the father retired.

from the family. It was a personal relinquishment. The rest of the family was joint, that is why Vasant Rao was allowed one half and not one quarter. The Appeal Court declares the release is for the benefit of the whole family, yet it has operated solely for the benefit of Vasant Rao. In effect it is a gift by the father to his son and that with the consent of the co-parceners. Viewed in that light the case nearly approaches *Rai Bishen Chand v. Mussumat Asmaida Aker*<sup>(1)</sup> and so long as the father has not kept enough to give an afterborn son as much as the earlier born sons received, an equal share must be made good to the afterborn son by the brothers. *Krishna v. Sami*<sup>(2)</sup>, *Chengama Nayudu v. Munisami Nayudu*<sup>(3)</sup>

Where the father leaves nothing to himself and the afterborn son has no source from which to maintain himself he can claim from the separated brothers and is as equal to them.

Our second point is that the judgment of the Privy Council says that the release enures for the benefit of the other branch. The judgment treats Madhav Rao as civilly dead but this does not break up the coparcenary. Madhav Rao is personally disqualified by the release but this does not prevent the son of a disqualified person from inheriting property. The afterborn son is in the same position as his brothers.

*Sethna* (with *Setalrad*) for defendant — *Krishna v. Sami*<sup>(2)</sup> has not been followed in Bombay. See *Bopuji v. Pandurang*<sup>(4)</sup>, *Bal-krishna Trimbak Tendulkar v. Savitribai*<sup>(5)</sup>, *Balir Krishna Rao v. Lakshmana Shanbhogue*<sup>(6)</sup>, *Nawal Singh v. Bhagican Singh*<sup>(7)</sup>, *Vir-Mitrodaya*, p. 492.

KANTH, J. — This suit is a precedent to the case of *Wamanrao v. Anandrao*<sup>(8)</sup> decided by the Appellate Court in September 1901, and subsequently by the Privy Council<sup>(9)</sup>

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(1) (1891) L. R. 11 J. A. 161

(2) (1885) 9 Mad. 61

(3) (1896) 20 Mad. 75

(4) (1887) 6 Bom. 616

(5) (1878) 3 Bom. 51

(6) (1891) 1 Mad. 302.

(7) (1892) 4 All. 407

(8) (1901) 6 Bom. L. R. 925.

(9) (1903) 3 B. L. R. 40

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The facts of the case, so far as they concern the question now before me, are the following —In 1883 there was a joint Hindu family consisting of one Kashinath, his two sons Ganpatrao and Madhavrao, Ganpatrao's six sons and Madhavrao's only son Vasanttrao. This family was possessed of considerable ancestral property. In January 1883, Vasanttrao being then some five years of age, Madhavrao found himself heavily involved in debt, and in consideration of his father's Kashinath paying Rs 5000 "in settling the debts and for various other considerations, Madhavrao executed a deed of release in his favour relinquishing all interest in the family property.

In 1901 Vasanttrao instituted a suit against Ganpatrao's sons (Ganpatrao and Kashinath both being dead) to obtain a share in the ancestral property. Among the various grounds raised by the then defendants, I need only refer to the contention that by the release Madhavrao forfeited not only his own interest in the ancestral property but that of his descendants. It was held however, and the Privy Council confirmed the finding, that the release operated to extinguish only Madhavrao's own personal interest and did not bind his son and that it must be treated as enuring, not as for the benefit of Kashinath alone, but for that of the whole coparcenary. Vasanttrao, therefore, as representing one of the two sons of Kashinath, was held entitled on partition to a half share of the property, Ganpatrao's children taking the other half.

Now the present plaintiff is a second son of Madhavrao's, born in 1905 nearly a year after the decree for partition, and more than sixteen years after the date of the release. He sues his brother Vasanttrao for a moiety of the ancestral property that has fallen to the latter's share, and the preliminary issue has been raised whether he is at all entitled to participate in the property.

The answer to this question must in the main depend on the determination of Madhavrao's precise position. He is still alive, he claims no further share in the property himself, nor was any claimed on his behalf by the Official Assignee who represented him in the previous suit. The only direct allusion

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to his status made in the judgment of the Appeal Court is in a passage towards the end, where it is said that 'the shares must be determined as though Madhavrao were dead', but this, although clear and adequate for the purposes of that judgment, is of little present assistance. The learned counsel for the plaintiff however sought to make it the basis of an argument that Madhavrao must be regarded merely as one civilly dead, as if he had turned to the ascetic life, or at the most as one disqualified from sharing in the family estate. But this supposition is not in accord with the facts and it needs but few words to demonstrate its impropriety. Hindu law bases exclusion from participation on certain clear and well-defined grounds none of which can be applied to Madhavrao either literally or metaphorically. He is not afflicted with insanity or other congenital infirmity, and it is not pretended that he has assumed another order. Whatever be the true history of the transactions culminating in the release of 1889, the facts accepted by the parties in the present suit are these, that Madhavrao received Rs 5 000 from his father, directly or indirectly, and that he thereon resigned all his interest in the ancestral estate. No doubt this sum seems exiguous in comparison to the three quarters of a lakh to which he was then apparently entitled but small as it was he accepted it in satisfaction of his claims and he has never sought to recede from the arrangement. I can only look upon him, therefore, as a coparcener who has elected to take his portion and recede from the family and it is thus as I understand that he was regarded in the earlier suit.

The question then resolves itself into this what are the rights as against the joint family of the son of a separated coparcener born subsequent to his father's separation? So stated the question bears its answer upon its face there is no known rule or principle which can entitle such a son to claim aught from the coparcenary. Vasantrao's example affords plaintiff no assistance. He was alive when his father executed the release, and the latter was powerless to divest him of rights already vested in him. But the plaintiff stands in entirely different

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case, he was not even *en ventre sa mère* when his father quitted the family. The various authorities cited by his learned counsel—I may more particularly instance *Gripit v. Gopalrao*<sup>(1)</sup>, *Ras Bishen Chand v. Musunrat Almeida Koer*<sup>(2)</sup>, and *Chengama Nayudu v. Munisami Aiyudhu*<sup>(3)</sup>—amount to no more than this: that where there has been a partition between a father and his sons, an afterborn son may claim a share from his brothers, if his father reserved no property for himself or is unable to provide for him. The Madras case bears a distant resemblance to that now before me, in that Madhavrao is destitute of means and unable to provide for the plaintiff, but there the similarity ceases. These cases proceed upon the special principle of Hindu Law that the unborn son cannot be deprived of his share in the paternal estate by a prior partition. ‘Sons with whom the father has made a partition shall give a share to another son who is born after it’ (Vishnu 2 Colebrooke, II, 263). But the application of this principle is expressly limited to the case of partition between sons and father, and there is no warrant for its extension to a son born to a separated coparcener, other than the father of the family after partition. Indeed, it is only necessary to reflect upon the confusion that such an extension of the principle would entail to realize its impracticability.

There is little need to reinforce the argument. The texts of Vishnu and Yajñavalkya which direct separated brothers to cede a share to the afterborn brother have been explained by the commentators as applicable only to posthumous sons (*Gangit v. Gopalrao*<sup>(4)</sup>), and even this direction is restricted, it would seem, to the case of the son *en ventre sa mère* at the date of the partition (Mayne, section 472, 7th edn). Relatively to the head of the family with whom Madhavrao effected partition, plaintiff is not a son but a grandson, he was not *en ventre sa mère* at the date of the partition and he was not posthumously born. The circumstances that the father has dissipated the small patrimony that he received and is now unable to provide for him is an accident that does not bear upon the argument.

(1) (1890) 23 Bom 636

(2) (1884) J R 111 A 364 C All 500

(3) (1896) 20 Mad 75

I, therefore, decide that plaintiff is not entitled to claim a share of the property in suit

Attorneys for the plaintiff — *Messrs. Jehangir, Gulabbhai and Billworia.*

Attorneys for the defendant — *Messrs. Bicknell, Merwanji and Romer,*

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I N I.

## ORIGINAL CIVIL.

*Before Mr Justice Macleod.*

SIR JEHANGIR COWASJI JEHANGIR (PLAINTIFF) : THE HOPF MILLS, LIMITED (DEFENDANTS) \*

1903

September 10

*Decree—Execution—Civil Procedure Code (Act XIV of 1882), sec 244—Transfer of Property Act (IV of 1882), sec 93*

An application for redemption or foreclosure of a decree nisi is not an application in execution under the Civil Procedure Code but must be made in Court under the Transfer of Property Act, and until a decree nisi is made absolute there is no decree capable of execution

Where a decree nisi contemplated an account being taken, but was silent as to how that account was to be taken and the Court has declined to modify the decree by inserting such a direction, it would be out of the question to compel a party in execution proceedings to do that which he is not directed to do by the decree

*Ajndhia Pershad v Baldeo Singh*(1) and *Danram v Dabaji*(2), followed

### PROCEEDINGS IN CHAMBERS

The plaintiff, a mortgagee in possession of the property belonging to the defendants, instituted this suit to recover the money due to him under his mortgage and prayed that in default of payment the right to redeem might be foreclosed or the mortgaged premises sold. After the mortgage the plaintiff had entered into an agreement with the defendants under which they could work the Mills.

\* Suit No 170 of 1903

(1) (1901) 21 Cal 618

(2) (1897) 22 Bom 771



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On 26th January 1904 the plaintiff obtained a decree which was defective because *inter alia* there was no reference to the Commissioner and no direction whatever for taking accounts although the decree contemplated an account.

On 9th August 1904 the plaintiff applied for a decree for foreclosure or sale which was refused on the ground that the exact amount due to him was not ascertained.

On the 19th October 1907 the defendants' agents obtained a rule nisi calling upon the plaintiff to show cause why he should not pass his accounts as first mortgagee in possession of the defendants' property before the Commissioner for taking accounts.

The rule came on for argument before Davar, J., on 21st November 1907 who made it absolute<sup>(1)</sup> ordering the plaintiff to pass his accounts before the Commissioner. On appeal this order was set aside<sup>(2)</sup> by the Appeal Court on 3rd March 1908.

On the 15th August 1908 the defendants issued a notice to the plaintiff on the following terms:—

"Take notice that you are hereby required under section 244 of the Code of Civil Procedure to appear in person or by Advocate or Attorney of this Court before the sitting Judge in Chambers on the 29th day of August 1908 at 11-15 in the forenoon, to show cause why you should not render an account of moneys due and payable to you under the decree nisi passed herein on the 26th day of January 1904 less the value of the stock and stores in hand or the sale proceeds thereof and any sum that may be found on account to be in your hands as first mortgagee in possession after deducting from such value or sale proceeds all such charges, expenses and emoluments that you may be entitled to with respect to the mortgaged premises and the working thereof and execute a reconveyance of the mortgaged premises in Schedule A to the said decree nisi specified in favour of the 1st defendant Company on making payment of the said amount or such further or other order should not be made or directions given as to this Honourable Court may seem proper under section 244 of the Civil Procedure Code and if need be but not otherwise why issues should not be tried as to the first defendant Company's right thereto and heard along with Suit No. 650 of 1908."

The notice came on for argument on 5th September 1908.

*Kirkpatrick with Setalvad* for defendants.

(1) See 9 Bom L R 1350.

(2) See *ante* p. 216

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 SUPREME  
 COURT  
 OF INDIA

*Robertson*, Advocate General, with *Coyaj* for plaintiff —Our first preliminary objection is that no notice has been given to us as provided by section 248 of the Civil Procedure Code

*PER CURIAM*—This point was not taken on the last occasion when the plaintiff applied for a week's adjournment and being a purely technical objection may be taken to have been waived

*Robertson* —Our second preliminary objection is that the decree in this case cannot be executed under section 244 of the Civil Procedure Code as it is a decree *nisi*

Our third preliminary objection is that the defendants cannot apply for execution of this decree. No relief has been granted him against anyone. If he claims any relief he must apply to the Court under the Transfer of Property Act

*Kirkpatrick* —In reply to the second objection the plaintiff would remain in possession till the year 1916 and then the defendant could not redeem him

As to the second objection we say the decree directs the plaintiff to reconvey the property and that is precisely what we ask for here

We ask to be allowed to raise issues in this matter now.

*Robertson* —This application has been misconceived. We refer to *Ajulhia Pershad v Baldeo Singh*<sup>(1)</sup>, *Nandram v Babaji*<sup>(2)</sup>, *Akhunnissa Bibee v Roop Lal Das*<sup>(3)</sup>, *Tara Pal Ghose v Kamina Dass*<sup>(4)</sup>, and sections 88, 89 and 91 of the Transfer of Property Act

*Kirkpatrick* —We submit our procedure in this case is the only one we could adopt. Execution only means enforcement of a decree, the Code defines a decree in section 2. This would include a decree *nisi*. Section 235 of the Code speaks of decrees generally. Cf sections 260, 261 of the Code and Rule 75 of the High Court Rules. We refer to *Karim Mahomed Jamal v Rajooma* <sup>(5)</sup>. We have now served the plaintiff with notice under section 248 of the Code

(1) (1894) 21 Cal 818

(2) 118 7, 25 Cal. 137.

(3) (1907) 22 Bom 771

(4) (1911) 23 Cal 631

(5) (1907) 12 F m. 174.

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*Robertson* —It is now suggested for the first time that this matter may be treated as a motion in Court under the Transfer of Property Act. This cannot be done.

[MACLEOD, J. —Mr. Kirkpatrick you might move under section 78 of the Transfer of Property Act.]

*Kirkpatrick* —We desire such accounts taken as would enable us to proceed with the decree.

*Robertson* —We submit that to allow the defendants that relief would be to reverse the decision of the Appeal Court and this Court cannot in these proceedings rectify the decree of the Appeal Court. The case of *Aarim Mahomed Jamal v. Rajooma*<sup>(1)</sup> might have been cited to the Appeal Court but it has no relevancy here.

MACLEOD, J. —This is an application by the first defendant Company for the execution of a decree nisi, dated the 26th January 1904, passed in this suit which was brought by the plaintiff as first mortgagee of the defendant Company. Under that decree it was ordered that upon the defendants or any of them paying into Court on behalf of the plaintiff, etc.

There was no provision made in the decree for the way in which the account contemplated should be taken. On the 2nd December 1907 an order<sup>(2)</sup> was made by Mr Justice Davar on a rule taken out by the defendant Company that the plaintiff should pass his accounts as first mortgagee in possession and having regard to all the directions in the decree before the Commissioner and the Commissioner was directed to take such accounts. This order was not to be enforced for two months and if the plaintiff within that time filed a suit to establish an agreement made by him with the defendant Company on the 3rd October 1905 the order was to be suspended until that suit was determined. This order was reversed by the Appeal Court<sup>(3)</sup> on the 3rd March 1908. The defendant Company now say that they are anxious to redeem the plaintiff mortgagee but they cannot ascertain what amount should be paid into Court to

(1) (1887) 12 Bom 174

(2) (1907) 9 Bom L R 38

(3) see ante p 216 10 Bom L R 43

enable them to get a reconveyance of the mortgaged property. They are ready to pay into Court any ascertained sum. A mortgagor in such a position demands the sympathy of a Court of Equity. Unfortunately for the defendant Company the Court of Appeal has decided that the omission in the decree to provide how the account should be taken was intentional and that the decree left it open to the parties to have the account taken and settled privately by some person of their nomination. Further it appeared to the Appeal Court that an account had been taken by a person appointed jointly by the parties with the result that a certain sum had been found due by the defendant Company to the plaintiff.

Under these circumstances I am asked by the defendant Company in execution proceedings to make an order calling upon the plaintiff to render an account of moneys due and payable to him under the decree *now* passed herein, and to execute a reconveyance of the mortgaged premises in the said decree in favour of the defendant Company on making payment of the said amount. The question at once arises whether there is a decree which can be executed. It has been held that an application for redemption or foreclosure of a decree *now* is not an application in execution under the Civil Procedure Code, but must be made in Court under the Transfer of Property Act, and that until a decree *now* is made absolute there is no decree capable of execution *Ajudhia Pershad v. Baldeo Singh*<sup>(1)</sup> referred to in *Nandram v. Babaji*<sup>(2)</sup>. But it is argued that a decree directing accounts to be taken is a decree under section 2 of the Civil Procedure Code and can therefore be executed. The answer to that is that this decree *now* does not direct accounts to be taken. While it contemplated an account being taken it was silent on the question how that account was to be taken, and the Court has declined to modify the decree by inserting such a direction. I am asked now in execution-proceedings to order the plaintiff to do something which he is not directed to do by the decree. That would be out of the question under any circumstances. There is nothing whatever in the decree *now* which is capable

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(1) (1894) 21 Cal 818.

(2) (1897) 22 Bom. 771.

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JEHANGIR  
COWASJI  
THE HOPE  
MILLS  
LIMITED

of execution and the application must be dismissed with cos's Counsel certified

*Application dismissed.*

Attorneys for plaintiff—*Messrs. Bhaishanker, Kanga and Girdharlal*

Attorneys for defendant:—*Messrs Mulla and Mulla*

W. L. W.

## APPELLATE CIVIL.

*Before Chief Justice Scott and Mr Justice Latchelor*

1908

November 11.

MADHUSUDAN PARVAT STYLING HIMSELF SHANKARACHARYA OF DHOLKA (ORIGINAL DEFENDANT) APPELLANT, v SHRI SHANKARACHARYA SWAMI OF SHARADA MATH (ORIGINAL PLAINTIFF) RESPONDENT \*

*Civil Procedure Code (Act XII of 1907), section 11—Shankaracharya of Sharada Math plaintiff—Shankaracharya of Dholka, defendant—Dispute as to precedence or privilege between purely religious functionaries—Jurisdiction of Civil Courts*

The plaintiff, Shankaracharya of the Sharada Math at Dwarka in Gujarat, sued the defendant Shankaracharya of the Jyotir Math at Dholka in the same province for (1) a declaration that the defendant was not entitled to the style, title and dignities of a Shankaracharya and that he was not entitled to call for or receive any offerings from the people in Gujarat in his assumed capacity of a Shankaracharya of the Jyotir Math or a branch of that Math, (2) for an account of the money received by the defendant as a Shankaracharya in Gujarat with a decree for payment to the plaintiff of the sum found to have been so received by the defendant, and (3) for an injunction restraining the defendant from styling himself a Shankaracharya in Gujarat and from claiming and receiving offerings in Gujarat as Shankaracharya of the Jyotir Math or a branch of that Math

The lower Court made a declaration that the defendant was not entitled to call himself a Shankaracharya of the Jyotir Math or of a branch of it at Dholka and an injunction against the defendant so styling himself and claiming or receiving offerings. The claim for an account and recovery of offerings received by the defendant was not allowed as the offerings might or might not have been made to the plaintiff.

On appeal by the defendant

*Held*, dismissing the suit, that to decide disputes as to precedence or privilege between purely religious functionaries is no part of the business of the Civil Courts nor will they grant injunctions to prevent preachers from preaching where they like under any title they please provided no office or property is disturbed or interfered with

For interference with mere dignity no suit can be maintained

For voluntary offerings received no suit will lie

*Sri Sanjur Dharti Swami v Sidha Lingayah Charants*(1), *Sangapa v Gangappa*(2), and *Rama v Shieram* (3), referred to.

*Dwyer v Dodsworth*(4), followed

FIRST appeal against the decision of Chandulal Mathuradas, First Class Subordinate Judge of Ahmedabad, in Suit No. 640 of 1901.

The plaintiff, a Shankaracharya of the Sharada Math at Dwarka in Gujarat, sued (1) for a declaration that the defendant was not entitled to the style, title and dignities of a Shaakaracharya and that he was not entitled to call for or receive any offerings from the people of Ahmedabad and other places in Gujarat either in his assumed capacity of a Shaakaracharya or of Shaakaracharya of the Jyotir Math or of a branch of the Jyotir Math at Badriaath, (2) for a true and correct account of the proceeds that the defendant might have received during his sojourn at places mentioned in the plaint by virtue of his assumed capacity of a Shankaracharya; and (3) for a perpetual injunction restraining the defendant from styling himself a Shankaracharya in Gujarat as also from claiming or receiving offerings from the people of Ahmedabad and other places in Gujarat as a Shankaracharya or as a Shankaracharya of the Jyotir Math, or of a branch of the Jyotir Math of Badriaath.

The plaintiff alleged that he was the present occupant of the *Gadi* (seat) of Shri Shankaracharya at Dwarka in Gujarat called the Sharada Math, which was one of the four sees originally established in four directions by the well known and illustrious Shankaracharya, the restorer of the Vedic religion on the Advaita system of philosophy. The four sees so established were styled (1) the Jyotir Math, (2) the Govardhan Math,

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MADHU-  
SUDAN  
PANTAY  
v.  
SHRI  
SHANKARA-  
CHARYA.

(1) (1843) 3 Moo I. A. 193.

(2) (1878) 2 Bom 476

(3) (1882) 6 Bom. 116.

(4) (1796) 6 T. R. 651.

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MADHUL  
SUDAN  
PARVAT  
\*  
SHRUTI  
SHANKARA  
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(3) the Sharada Math and (4) the Sringeri Math. The first was situate in the Himalayas in Northern India, the second at Puri in Cuttack in Eastern India the third at Dwarka in Western India, and the fourth at Sringeri in Southern India. Each of the said four Maths was given exclusive jurisdiction over the provinces surrounding it and the Shankaracharya of the respective Maths was enjoined to minister to the spiritual, theological, religious and social wants of the congregations within his jurisdiction and he was invested with the exclusive right to the status, style and position of a Shankaracharya as also the right as such to call for and receive pecuniary and other offerings from the people under his charge. The plaintiff duly and lawfully succeeded to the *Gadi* of the Sharada Math at Dwarka in 1901 and thus he became entitled to and had been in enjoyment of the said status style and position of a Shankaracharya and to all the rights, titles, privileges and dignities as aforesaid appertaining to the *Gadi* of the Sharada Math which possessed exclusive jurisdiction over Cutch, Kathiawar, Gujarath and other districts in Western India. The line of succession to the *Gadi* of Shankaracharya of the Jyotir Math at Badrinath had long become extinct and it was universally recognized that any lawfully constituted Shankaracharya of that Math was not in existence. Notwithstanding this circumstance the defendant fraudulently assumed the title of Shankaracharya and was falsely alleging that his so called Math at Dholka was a branch of the Jyotir Math at Badrinath. Under his assumed title he called for and received pecuniary and other offerings from people at several places in Gujarath which was exclusively within the jurisdiction of the plaintiff to the serious detriment of the plaintiff's revenue and in derogation of his status, style and dignity as Shankaracharya and as occupant of the *Gadi* of the Sharada Math. The defendant was repeatedly warned to desist from arrogating to himself the title of Shankaracharya of the Jyotir Math or a branch of that Math in Umreth Dholka, Nadiad, Matar, Mehnadabad, Sarkhej Ahmedabad and other places in Gujarath and from collecting offerings from the people at said places but he failed to do so and his failure gave to the plaintiff the cause of action for the suit.

The defendant denied the plaintiff's status as Shankaracharya of the Sharada Math and contended that the plaintiff had no right to the style, position and dignities of a Shankaracharya and was therefore not entitled to the injunction sought for against the defendant, that the plaintiff's suit for the establishment of his right to the mere enjoyment of the dignities and position of a Shankaracharya was unsustainable in law, that the plaintiff's prayer that the defendant should be enjoined not to receive offerings from the people of Gujarath could not be entertained because the whole of Gujarath was not within the jurisdiction of the Court, that the Sharada Math and the Jyotir Math were two different Maths, there was no relation between them and it was not pretended that there was any other Shankaracharya of the latter Math, that the plaintiff was not entitled to call for an account of two voluntary offerings made to him as Shankaracharya of the Jyotir Math, that centuries ago, disputes having arisen between a former Shankaracharya of the Jyotir Math at Badrinath and the ruling authorities of that place, the then Shankaracharya left the Math enjoining his disciples not to reside in that Math thereafter, therefore the Shankaracharyas of that Math did not thereafter permanently live in the Math but they went about in Gujarath and other parts of India for the purpose of imparting religious instruction and the people believed that they were Shankaracharyas of that Math, that the Math was therefore not extinct and the ascendant preceptors of the defendant were always treated and respected as Shankaracharyas of the Jyotir Math and they established branches of that Math at several places in Gujarath, that the defendant and his preceptors were acknowledged as Shankaracharyas by several ruling Chiefs in Gujarath and even by the British Government which gave them licenses to carry arms, that the defendant and his preceptors had been preaching in Gujarath and other places and had been receiving offerings from the residents of those places for several years without any objection on the part of the plaintiff and his predecessors and so the plaintiff's claim was time-barred, that the territorial limits of the Maths being not fixed, the plaintiff was not entitled to claim exclusive jurisdiction to preach and collect offerings in Gujarath and that the

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plaintiff and his predecessors travelled out of Gujarath and received offerings within the territorial limits of the jurisdictions of the other Maths and that if the defendant and his preceptors did the same in Gujarath, the plaintiff suffered no injury and was not entitled to claim damages and injunction

The Subordinate Judge found that his Court had jurisdiction to try the suit so far as it referred to the district of Ahmedabad and the people residing in that district, that the plaintiff was the lawfully appointed Shankaracharya of the Sharada Math of Dwarka and being the present Shankaracharya of that Math, he was entitled to bring the present suit, that the Jyotir Math of Badrinath had been without a Shankaracharya for more than a century and there could be no branch of it in Dholka according to the rules laid down or intended to be laid down by the founder of that Math and the defendant was not a Shankaracharya of that Math or a branch of that Math, that the defendant could not found a branch or branches of the Jyotir Math at Dholka or any other place in the Ahmedabad District and he was not entitled to go round as a Shankaracharya of the Jyotir Math or of the Dholka branch of it for offerings in places within the limits of the jurisdiction of the Court and to collect such offerings from people residing therein as such Shankaracharya, that the claim was in time, and that the plaintiff could not sue for an account and could not recover those offerings or their value which had been voluntarily made to the defendant. The Subordinate Judge, therefore, passed the following decree —

I therefore declare that the defendant is not entitled to call himself a Shankaracharya of the Jyotir Math of Badrinath or of a branch of it at Dholka and to claim or receive any offerings from the people of the Judicial District of Ahmedabad in his assumed capacity of a Shankaracharya of the Jyotir Math of Badrinath or of the so called branch of it at Dholka and that he do restrain himself from calling himself as Shankaracharya of the Jyotir Math or of the so-called branch of it at Dholka and from claiming or receiving such offerings from the people of the district of Ahmedabad as such Shankaracharya of the Jyotir Math or of the so called branch of it at Dholka. The rest of the plaintiff's claim is disallowed hereby

The defendant appealed

*C N Thakore* (with *G N Thakore*) appeared for the appellant (defendant) —Section 21 of Bombay Regulation II of 1827

provides that no interference by Courts of law in caste questions is warranted. The plaintiff's suit is a caste question within the meaning of the Regulation and hence is not maintainable. The plaintiff calls himself a Shankaracharya of a Math called the Sharada Math at Dwarka. The defendant is a Shankaracharya of the Jyotir Math which has its branch at Dholka. The followers of the religion propounded by the original Shankaracharya constitute a sect some of whom may attach themselves to the plaintiff as one of the successors of the original *Guru*, while some may be devoted to the defendant who is another successor, while others may be attached to both. In the present suit the plaintiff has opened up the question of the right of devotees to attach themselves to the *Guru* to whom they feel themselves drawn. This right is purely a religious right involving the internal autonomy of the members of the sect or caste in matters religious. Such a right could not be rendered the subject of litigation in a Court of law. The term caste in the Regulation is not restricted to caste as used in a strictly limited sense. It has been held that the term is not necessarily confined even to the Hindus *Abdul Kader v. Dharma*<sup>(1)</sup>. The followers of the religion of Shankaracharya are therefore clearly included within the definition of the term. The circumstance of offerings being occasionally made to the religious head will not avail to take the case out of the category of caste questions. The principle of the Regulation is followed in other provinces *Roodulunn v. Damoolun*<sup>(2)</sup>. The prohibition contained in the Regulation is held applicable to numerous cases in some of which the emoluments were in the nature of fixed periodical fees. See also *Shankara v. Hanma*<sup>(3)</sup>, *Murari v. Suba*<sup>(4)</sup>, *Dayaram Hargovan v. Jethabhai Lakshminram*<sup>(5)</sup>, *Munri Diya v. Nagria Ganeshia*<sup>(6)</sup>. The Regulation is, therefore, very clearly a bar to the maintenance of the present suit.

Next we contend that, even apart from the Regulation, the suit is not one of a civil nature and is therefore beyond the cognizance of Civil Courts. No straining of language can bring

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(1) (1890) 20 Bom. 193.

(2) (1869) 1 Hy. 36.

(3) (1877) 2 B. 470 at pp. 472-473.

(4) (1882) 6 Bom. 720.

(5) (1890) 20 Bom. 781.

(6) (1899) 6 Bom. H. C. P. A. C. J. 17.

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the present suit within the description of suits referred to in the explanation to section 11 of the Civil Procedure Code of 1882 as being of a civil nature. What the plaintiff claims is a declaration that the defendant is not entitled to the style, title and dignities of a Shankaracharya and a further declaration that the defendant is not entitled to collect offerings in his assumed capacity of a Shankaracharya or of a Shankaracharya of the Jyotir Math or of its branch at Dholka. The other reliefs claimed are either subsidiary to the above or are merely consequential. No objection is taken to the defendant's collecting offerings without calling himself a Shankaracharya. Such a claim could not have been made by the plaintiff in the absence of any grant from the Crown, certainly not in the absence of a grant from the original Shankaracharya. The suit, therefore, resolves itself into a suit in respect of style, title and dignities. In *Sri Sankar Bharati Swami v. Sidha Lingayat Charants*<sup>(1)</sup> the Privy Council doubted whether an action could be maintained in a Civil Court by the grantee of a dignity from the Crown against a person who without a grant would assume the like dignity. On remand the High Court of Bombay held that such an action could not be maintained. See also *Shankara v. Hanma*<sup>(2)</sup>. In the present case there is even no allegation of a grant. Besides, the name or title of Shankaracharya has not been let down as a heritage by the original *Guru*. Ghose's Hindu Law, p. 781 (2nd edn). The suit is, therefore, clearly not maintainable as being one brought to vindicate a right to mere dignity. *Sangapa v. Gangapa*<sup>(3)</sup>.

The office of the Shankaracharya of the Sharada Math at Dwarka has nothing to do with the right to assume the title of a Shankaracharya within particular limits. Even if the right to this dignity be assumed to be in any way connected with the office at Dwarka that circumstance makes no difference. *Rama v. Shriram*<sup>(4)</sup>.

The office, if it is called one, of Shankaracharya consists strictly speaking, of the right to exercise moral and spiritual supervision

(1) (1811) 3 Moo I A 128 at p. 217

(2) (1817) 2 Bom. 40

(3) (1878) 2 Bom. 470

(4) (1882) 6 Bom. 116 at p. 121

over the followers of the original *Guru*. No suit could lie for the enforcement of claims appurtenant to such an office *Tholappala Charlu v Venkata Charlu*<sup>(1)</sup>

The suit is in effect to compel a particular kind of religious observance from certain people which being an obligation of a moral kind is not enforceable *Striman Sadagopa v. Krishna Tatachariyar*<sup>(2)</sup>. The circumstance of pecuniary presents being received by the occupant of the office hardly makes any difference, as these are not any fixed and certain emoluments attached to any office but are voluntary offerings in the nature of fluctuating gratuities *Boyle v Dodsorth*<sup>(3)</sup>, *Muhammad Yussuf v. Sayad Ahmed*<sup>(4)</sup>, *Tholappala Charlu v Venkata Charlu*<sup>(5)</sup>, *Narayan Fettek Purab v Arachnaji Sadashee*<sup>(6)</sup>

It is not alleged that the defendant ever moved about calling himself Shankaracharya of the Sharada Math. No fees are claimable as of right by any Shankaracharya from his followers within any given area. The plaintiff's office, being confined to duties of a moral and spiritual kind, is in no way interfered with by the defendant's claiming similar functions in a distinct capacity. No cause of action can accrue under such circumstances to the plaintiff.

The cases relied on by the Subordinate Judge are not on all fours and are clearly distinguishable. In none of them a claim to mere dignities was made. The case of *Gursongaya v Tamana*<sup>(7)</sup> was a case in which there was a contest in respect of fees claimable as of right by the plaintiff in virtue of the office he was holding. In *Sayad Hashim Sheikh v Hussainsha*<sup>(8)</sup> there was direct interference with the exclusive right to perform the duties and enjoy the privileges specifically appertaining to the office of the Vatandar Kazi and Khalif of Gadag, which was held by the plaintiff. In *Srinivasa v. Tiruvengada*<sup>(9)</sup> it is expressly stated that, where the claim is for a mere dignity or for damages caused by loss of voluntary offerings, no relief can be given. In

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(1) (1870) 19 Mad. 62 at p. 64.

(2) (1863) 1 Mad. H. C. R. 301.

(3) (1790) 6 T. R. 651.

(4) (1861) 1 Bom. H. C. J. App. xvii pp.

(5) (1885) 10 Bom. 233.

(6) (1891) 16 Bom. 251.

(7) (1888) 13 Bom. 479.

(8) (1888) 11 Mad. 430.

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*Sri Sadagopa Ramanuja Pelda v Sri Mahant Rama Kisore Dossjee*<sup>(1)</sup> relief was granted as the defendant's action amounted to an attempt to deceive by misrepresentation implied in the use of the word "vegyare"

We further contend that no exclusive right to assume the title of Shankaracharya and to receive the offerings in that capacity has been proved by the plaintiff. The *onus* on this point was on the plaintiff. No work proved to have been written by the original Shankaracharya himself confers or refers to such right. The works of Anandgiri, Madhav and other authoritative biographers of Shankaracharya's life prove the absence of such a right. Ayar mentions no such right as having existed. Mathamunay on which the plaintiff relies, is not a work of Shankaracharya and could not have come down from him.

It is extremely unlikely that limits would be fixed by one who was himself an itinerant preacher and who wanted to spread his own religion. If *Sanyasis* could go everywhere, then why not the head of the *Sanyasis*? No right as such to receive gifts had accrued to Shankaracharya and he could not hand it down, fixing limits for the exercise of the right. Different Vedas, Gods and Goddesses having been assigned to each principal Math and the followers having the liberty to elect either in all the parts of India, the fixing of territorial limits would be absurd and anomalous. In no analogous institution do we find such limits fixed. The fixing of territorial limits would be inconsistent with an increase in the number of the Maths. The Maths have undoubtedly increased numerically. *Sri Santhar Bharti Swami v Silka Lingayah Charanti*<sup>(2)</sup>, Ghose's Hindu Law, p 778 (2nd edn). People of the Shringeri Math have been going to the remotest corners of India. Hunter's *Imperial Gazetteer*, Vol XIII, page 79. A branch Math has grown up at Sankeshvar. *Bombay Gazetteer*, Vol 21, pp 601 and 602.

*D A Khare* (with *U K Trivedi*) appeared for the respondent (plaintiff). —There is conclusive evidence in the case to show that the defendant is not entitled to the style title and dignities

<sup>(1)</sup> (1888) 20 Mad, 189

<sup>(2)</sup> (1843) 8 Moo 1 A 198 at p 217

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of a Shankaracharya of the Jyotir Math For several hundred years past there has been no Shankaracharya on the *gadi* of the Jyotir Math and the affairs of that *gadi* are in the hands of a Brahmin. The defendant cannot trace his descent from any actual occupier of the *gadi*. One is entitled to be called a Shankaracharya only if he occupies one of the four *gadis* founded by the original Shankaracharya. The four seats were endowed with separate and exclusive jurisdictions, the extent of which has been set forth in the *Mathamnaya*.

The jurisdictions being exclusive, the defendant, even if he be a genuine Shankaracharya, has no right to establish himself in Gujarath which is within the jurisdiction of the plaintiff. All plaintiff's witnesses and several of defendant's witnesses admit that Gujarath is within the jurisdiction of the plaintiff's Sharada Math.

The defendant's predecessors in title established themselves at Dholka so recently as 1873. Since that time to this their rights have been repeatedly challenged in Civil Courts and they have failed to establish those rights.

Shankaracharya's is a high religious office with *quasi* judicial functions on questions of religion, law and ritual in the Hindu society, and the organization of the four Maths with exclusive jurisdictions was necessary to prevent conflicts of authority and jurisdiction.

The question has to be looked to from the standpoint of a Hindu sovereign. Would a Hindu sovereign tolerate an imposter and allow him to feign the office and dignities of Shankaracharya?

The plaintiff has cause of action as the office is instituted for public benefit. Although the emoluments consist of merely voluntary gifts the plaintiff has a cause of action because according to the rules of ascetic life admitted by the defendant no *Sanyasi* can accept a pecuniary gift unless he is a Shankaracharya. The defendant himself admits that nobody would give him any gift if he did not style himself Shankaracharya. The defendant being not entitled to the style and privileges of Shankaracharya, his act in assuming the same is fraudulent and

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wrongful, and the cause of action so accrued to the plaintiff, he being the rightful claimant of the privileges of Shankaracharya in Gujarathi. We do not, however, press the claim for damages, but we maintain that the decision of the lower Court as to the other relief, declarations and injunction is correct, and as given by a Hindu Judge of high learning and experience is entitled to great weight.

SCOTT, C J —The plaintiff brought this suit for a declaration that the defendant is not entitled to the style, title and dignities of a Shankaracharya and that he is not entitled to call for or receive any offerings from the people of Ahmedabad and other places in Gujarath either in his assumed capacity of a Shankaracharya or of a Shankaracharya of the Jyotir Math or of a branch of that Math, for an account of the money received by the defendant as a Shankaracharya in Gujarath with a decree for payment to the plaintiff of the sum found to have been so received by the defendant, and for an injunction restraining the defendant from styling himself a Shankaracharya in Gujarath and from claiming or receiving offerings in Gujarath as a Shankaracharya or as a Shankaracharya of the Jyotir Math or of a branch of the Jyotir Math of Badrinath. The Subordinate Judge made a declaration that the defendant is not entitled to call himself a Shankaracharya of the Jyotir Math of Badrinath or of a branch of it at Dholka and to claim or receive any offerings from the people of the Judicial District of Ahmedabad in his assumed capacity of a Shankaracharya of the Jyotir Math of Badrinath or of the so called branch of it at Dholka, and an injunction against the defendant so styling himself and claiming or receiving offerings. He held, however, that the claim for an account and recovery of offerings received by the defendant was unsustainable, as the offerings might or might not have been made to the plaintiff. From the decree of the Subordinate Judge the defendant has appealed to this Court.

It is not disputed that the religious reformer Shankar, about the 8th century A D, established four Maths or Monasteries for Sanyasis or Ascetics in the North, South, East and West of India, namely, the Jyotir Math at Badrinath in the Himalayas,

the Shringeri Math in Southern India the Sharada Math at Dwarka in Gujarath and the Govardhan Math at Puri in Cuttack

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The name Shankaracharya, which means 'the preceptor Shankar,' properly belongs to the reformer Shankar alone, but after his death some of his leading followers appear to have adopted the name as a title probably, as Mr Ghose in his work on Hindu Law (p 784) suggests, because they thought themselves incarnations of the reformer

The doctrines of Shankar having obtained a permanent footing in India there naturally arose in the course of centuries other preachers besides the Mohunts of the original Maths who claimed to be incarnations of the founder and established new Maths in his honour. On the other hand, the original Maths did not continuously preserve their early prestige. Thus we find the Mohunt or head of the Shringeri Math writing in Shako 1774 (A D 1852) to the Mohunt of the Sharada Math a letter (exhibit 333) in which he thought it necessary to make 'a statement of the conventional practice bearing in mind the disrespect with which it is treated in the present generation.' He relates how the Acharyas of the Govardhan and Jyotir Maths degraded themselves to the position of Gosains and thus these two Maths remained without any Acharyn although the Govardhan Math was subsequently revived by a Sanjasi from Gougak Nakhel. He describes how Sanjasis of the Shringeri Math have established Maths and set themselves up falsely as independent Acharyas and he combats the doctrine that any branch Maths can exist. He then proposes that certain areas should again be recognized as the territories of the respective Maths. We note from the report in 3 Moore's Indian Appeals, p 199, that it was proved or alleged in the case of *Sri Sunkar Bharli Swami v Sidha Langayah Charanti*<sup>(1)</sup> that the Shringeri savasthan had by 1835 A D been divided into five or six Maths, the Swamis of each of which claimed equal privileges as successors of Shankar.

It is claimed on behalf of the defendant that his predecessor in 1872 established or re established the Jyotir Math at Dholka

(1) (1843) 3 Moo L A 194.



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This was not the first time that rival Shankaracharyas had appeared in Gujarath, thus the witness Maneklal Keshowlal (exhibit 241) states that in Gujarath before Raj Rajeshwaranand the defendant's predecessor, two other Shankaracharyas had come but as they proved to be false they went away.

The establishment of the Math at Dholka followed by visitations and preaching by its Mohunt in various parts of Gujarath caused dissension amongst the Smart Brahmins, particularly at Sidhpur, and soon aroused opposition from the Mahunt of the Sharada Math.

The opposition was based upon practical as well as sentimental grounds, for it is customary for a successful preacher to receive money offerings from his admirers, and the attraction of followers to the Dholka Mahunt involved the withdrawal of probable or possible donors of offerings from the Dwarka Mahunt. In order to put a stop to the competition of the Dholka Mohunt the plaintiff in 1887 with the concurrence of his preceptor the then Mohunt of the Dwarka Math filed a criminal complaint at Sidhpur against Raj Rajeshwaranand, the then head of the Dholka Math, charging him with cheating by personating the Shankaracharya of the Jyotir Math. This complaint was dismissed and three other complaints of a similar nature brought against Raj Rajeshwaranand by Brahmin followers of the Dwarka Mohunt suffered the same fate.

The present suit is the first attempt made in a Civil Court to assert the right of the occupant of the Dholka Math to preach as a Shankaracharya in Gujarath.

It is contended on the plaintiff's behalf that he has, through that part of India where Gujarathi is spoken, the exclusive privilege of preaching as a Shankaracharya and receiving the offerings of the followers of Shankar. This contention is based on passages in certain versions of the Mathamnaya or traditional precepts of the Maths produced by some of the plaintiff's witnesses.

There is no authoritative version of the Mathamnaya and witnesses for the defendant have produced other versions of it.

which differ in material particulars from those relied upon by the plaintiff. Thus, the plaintiff's versions after prescribing certain territorial limits for each Math contain the following precepts (see exhibit 335, paragraphs 25 and 26) — "The head preceptors should never enter into each other's territories, that is the rule. Good rules would be violated by transgression of the boundaries. It gives rise to an abode of quarrels, one should avoid that."

The defendant's versions do not contain these precepts nor any definition of territorial limits. It is not argued that the Mathamnaya was composed by Shaakar himself and a learned witness for the plaintiff, Anandshankar Bapubhai, says that he has not read any work of the first Shankar in which he has defined the territories of the Maths. If there ever was any strict reservation of areas for the Mohants of the different Maths certain facts proved in the case indicate that the reservation has long been disregarded. Thus, in recent times the Mohant of the Shringeri Math and the deputy of the Mohant of the Govardhan Math have visited Gujarat and taken offerings from their admirers while the plaintiff's predecessor visited Mathura and Benares and received offerings in those places. Again, when Raj Rajeshwaranand, the defendant's predecessor, came to Sidhpur in Gujarat as a Shankaracharya it is on record that the plaintiff who was then a disciple of the Mohant of the Sharda Math made a mental obeisance in his honour.

It is clear from the above references to the evidence that the plaintiff has not succeeded in proving any exclusive and unbroken customary privilege for himself and his predecessors to preach and receive offerings as Shankaracharya in Gujarat. But, even if he had succeeded in discharging this burden, his suit would still fail, unless he could show that his claim was of a civil nature such as the Court will entertain. See Civil Procedure Code, section 11.

To decide disputes as to precedence or privilege between purely religious functionaries is no part of the business of the Civil Courts, nor will they grant injunctions to prevent preachers from preaching where they like under any title they please,

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provided no office or property is disturbed or interfered with. The Subordinate Judge has treated the case as one of disturbance of an office, namely, the office of Mohunt of the Sharada Math, although his decree is to restrain the defendant from styling himself Shankaracharya of the Jyotir Math and from claiming or receiving offerings in that capacity. Here there is clearly a confusion of ideas. The office of Mohunt of the Sharada Math is in no way endangered by the defendant's action in claiming to be a Shankaracharya of the Jyotir Math, nor are voluntary offerings made to Shankaracharyas in Gujarath fees claimable as of right by the holder of the plaintiff's office. The office, its property and appurtenant fees remain absolutely unaffected by the defendant's action. The defendant has never tried to represent himself or pass himself off as the Mohunt of the Sharada Math. The conclusion arrived at by the Subordinate Judge that the defendant was not truly the Shankaracharya of the Jyotir Math could not help the plaintiff's case. Even if we assume that conclusion to be correct it was irrelevant, for if the plaintiff had an exclusive privilege of preaching which could be enforced in a Civil Court, it could not matter what the real status of the defendant might be, while if he had no such privilege his suit must fail. The appearance of the defendant and his predecessors as Shankaracharyas in Gujarath may have affected the prestige as preachers of the heads of the Sharada Math, but for interference with a mere dignity no suit can be maintained. See per Lord Campbell in *Sri Sunkur Bharti Swami v. Siddha Lingayah Charants*<sup>(1)</sup>, *Sangapa v. Gangapa*<sup>(2)</sup>, *Rama v. Shivram*<sup>(3)</sup>. Their appearance may also, by attracting offerings to themselves, have reduced the sums which would have been received by the Sharada Mohunts as voluntary offerings, but for voluntary offerings received no suit will lie. See *Boyle v. Dodsworth*<sup>(4)</sup>. On this ground the Subordinate Judge seems to have refused an account though he inconsistently granted an injunction to restrain the receipt of further offerings.

(1) (1913) 3 Moo I A 198 at p 217

(2) (1878) 2 Bom 476

(3) (1882) 6 Bom 116

(4) (1790) 6 T R 681

For the above reasons we hold that this suit is not maintainable. We allow the appeal, set aside the decree, and dismiss the suit with costs throughout on the plaintiff's side.

Cross-objections dismissed with costs.

*Decree reversed*

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## APPELLATE CIVIL

*Before Chief Justice Scott and Mr Justice Batchelor*

UMABAI KUM MANGESHRAV AND ANOTHER (ORIGINAL PLAINTIFFS),  
APPELLANTS v VITHAL VASUDEV AND OTHERS (ORIGINAL DEFENDANTS),  
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*Civil Procedure Code (Act XIV of 1887) section 29—Lands situate at different villages and in possession of different persons under different titles—One suit to recover possession of the lands—Misjoinder of parties or causes of action—Interlocutory judgments against different defendants—Final judgment for possession to be reserved till the conclusion of the trial*

The plaintiff, one of the reversionary heirs, sued to recover possession of a moiety of certain lands which were situate at different villages and in possession of different persons who were alienees by sale mortgage or lease from the widow of the last male holder. In the lower Courts the suit was dismissed for misjoinder of parties or causes of action.

*Held* on second appeal that though the lands were situate in several different villages, provided the venue for the trial is the same the right of the plaintiff to have her claim tried in one suit is the same as if the different holdings were all in the same village. It is never any bar to a suit in ejectment that many persons are in possession. The only possible objections were on the ground of inconvenience. The difficulties arising from variety of defences can be cured by the successive trial of the issues separately affecting different defendants. Following the English practice interlocutory judgments may, if the plaintiff succeeds be given against different defendants as their cases are disposed of, final judgment for possession of the whole property being reserved till the conclusion of the trial of the whole case.

*Ishan Chunder Haras v Rameswar Mondol*(1) and *Nando Kumar Askar v Banomali Gajan*(2) approved.

\* Second Appeal No. 233 of 1908

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*Sami Chetti v Amman Achy*(1), *Vasudera Shanbhaga v Kulsad Narnapai*(2), *Mahomed v Krishnan*(3) and *Parbati Kunwar v Mahmud Fatima*(4), referred to

*Kachar Bhaj Taya v Bai Rathore*(5), distinguished

SECOND appeal against the decision of C. C. Boyd, District Judge of Kanara, dismissing an appeal against the decree of R. R. Gangolli, First Class Subordinate Judge of Karwar

The plaintiff Annapurnabai sued to recover possession of an equal half share in the properties specified in the schedule annexed to the plaint and mesne profits of the said share for the years 1900, 1901 and 1902. It was alleged in the plaint that the plaintiff, defendant 24 Lakshmbai, and Radhabai, deceased, were the daughters of Mangesh alias Mangba, who died leaving no sons. After his death, his widow Parvatibai enjoyed the properties till her death which took place on the 30th July 1900. Since then the plaintiff and defendant 24 became entitled to the properties in two equal shares as heirs, their sister Radhabai having died during their mother's life-time. Defendants 1-23 asserted title to the said properties on the ground that the plaintiff's mother had sold, mortgaged or let the lands on *mulgeni* (perpetual lease) to them, but the said transactions became invalid after the death of their mother, therefore they should be set aside. The plaintiff and defendant 24 had in the year 1900 obtained a declaratory decree to the effect that the plaintiff, defendant 24 and their sister Radhabai, who was then alive, were entitled to the properties held by the defendants and that the alienations made in their favour by the deceased Parvatibai could not affect the title of the plaintiff and her sisters after the death of their mother Parvatibai. Defendant 25 was the transferee of the right, title and interest of defendant 24. Defendants 1-23 refused to give up the plaintiff's share in the properties though they were called upon to do so, hence the present suit.

Defendants 1-23 claimed to hold the properties as mortgagees, purchasers or *mulgeni* tenants under the plaintiff's mother

(1) (1873) 7 Mad. H. C. R. 200.

(2) (1887) 11 Mad. 100

(3) (1874) 7 Mad. H. C. R. 200.

(4) (1907) 29 All. 267

(5) (1883) 7 Bom. 783

Parvatibai and contested the claim on the ground of limitation and misjoinder of parties or causes of action

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Defendant 24 answered that though she had transferred her half share to defendant 25, the transfer was fraudulent and without consideration, therefore, it should be set aside and her share should be given to her

Defendant 25 asserted his title under the deed of transfer passed to him by defendant 24 on the 8th December 1891

The Subordinate Judge raised in all fifteen issues, but he found on issues 6, 7 and 15 only. His findings on those issues were —

(6) The claim was within time

(7) The suit was bad for misjoinder of parties or causes of action

(15) The plaintiff was not entitled to any relief.

The Subordinate Judge therefore dismissed the suit. The following is an extract from his judgment —

*Issues 6, 7 and 15* — These issues are the most important ones in this case, and go to the root of the plaintiff's claim. The property described in the plaint admittedly belonged to the plaintiff's deceased father Mangesh *alias* Mangba bin Dulba Shenvi. He died in the year 1852 leaving a widow Parvatibai *alias* Manakbai and 2 sons, Subraya and Pandli *alias* Pandlik. Subraya died in the year 1853 or 1854 leaving a widow Mathura. \* \* Mathura died in the year 1869 or 1870. Parvati died on the 30th July 1900. Exhibits 4, 5, 6 and 7 show that Pandlik was adopted by Raghunath Krishna Shenvi a brother of the deceased Parvatibai. It is in evidence that Pandlik too died some years ago, though the exact year of his death cannot be ascertained. Although the plaintiff ingeniously describes this claim as a suit for partition, yet it is evident that her intention is to obtain a declaratory decree that the several alienations made by her mother to many of the defendants in this case are invalid against her after her mother's death.

The suit as framed is not maintainable as it includes within it several distinct causes of action which could not be joined together in the same suit — *Kachar Bhaj Vaya v Bai Rathore*<sup>(1)</sup>, *Ganesh Lal v Kharati Singh*<sup>(2)</sup>. In *Sada bin Raghu v Rama bin Govind*, the Bombay High Court has approved of the decision at page 289 I L R. 7 Bombay, though it has been doubted in Madras — *Mahomed v Krishnan*<sup>(3)</sup> vide I L R. 16 Bombay 608 at p. 611. The

(1) (1883) 7 Bom. 289

(2) (1894) 16 All. 270.

(3) (1897) 11 Mad. 100

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Allahabad decision (I L R 16 All 279) is on all fours with the present case. This Court is not bound to follow the decisions of the Madras High Court on this point as it is bound by the decisions of the Bombay High Court in cases of difference of decisions (I L R 17 Bombay, page 555 at page 556). There are ample materials in the evidence recorded in this case to show that the plaintiff's mother Parvatibai held the property in suit adversely to her son Subba and the latter's widow Mathura who died in the year 1869. She must therefore be treated as absolute owner of the property in suit even before the death of Mathura, the widow of Subba alias Subraya. It is admitted in the plaint itself that plaintiff's mother Parvatibai enjoyed and dealt with the property from the very day of the death of Mangba in 1852. The evidence afforded by exhibits 284, 300 and 310 is a sufficient indication that Parvatibai's possession of the property in suit before its alienation was adverse to her son Subbaya and the latter's widow Mathura. Under the circumstances disclosed in this case, I find that the suit is bad for misjoinder of different causes of action against different defendants in spite of the fact that it is ingeniously designated as a suit for partition and that it is not in time. The plaintiff was asked to adopt the course indicated in I L R 16 All 279, but she did not do so in time.

The plaintiff having appealed, the District Judge summarily dismissed the appeal under section 551 of the Civil Procedure Code (Act XIV of 1882). His reasons were as follows —

I fully agree with the remarks in the judgment that there is every indication that Parvatibai's possession of the property after the death of Mangba was hostile to Subraya and his widow and plaintiff.

It is proved that Parvatibai dealt with parts of the property in her own name instead of in the name of the owners whose guardian she was. The contention that she did not mean by putting her name, to make herself out owner, will not stand. No guardian acting honestly would behave so. In the plaint in the present suit plaintiff admits that Parvatibai 'enjoyed and disposed of' the property since the death of Mangba.

Things being so clearly the object of this suit was to obtain declaratory decrees against each of the various alienees of Parvatibai, and thus the facts are the same as in *Ganeshi Lal v. Khairati Singh* (16 All 279) which has been twice approved by our own High Court. Mr Shantaya (appellant plaintiff's pleader) did not deal with this point at all, but contented himself with arguing that in a suit for partition interested third parties, taking their right from some member of the family may be added as parties (16 Bom 608). That is not the point here. This last mentioned decision upholds the Allahabad ruling above mentioned.

Another decision cited by Mr Shantaya, reported at p. 925 of Vol VII, Bombay Law Reporter, does not apply, for the plaint itself in this case shows plaintiff's object.

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The plaintiff preferred a second appeal and she having died pending the appeal her daughters Umabai and Radhabai were brought on the record as her heirs

*Raukes* (with *N A Shireskar*) for the appellants (heirs of the plaintiff) —We contend that the lower Courts erred in law in holding that our suit was bad for misjoinder of parties or causes of action. The plaintiff's cause of action arose on the death of her mother Parvatibai and then she found that several persons were in possession of the properties of which she wanted to recover possession. It is true that the defendants claim under different titles such as purchasers mortgagees and lessees. But the cause of action has no relation whatever to the defences which may be set up by the defendants. Nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action or in other words to the medium upon which the plaintiff asks the Court to arrive at a favourable conclusion. *Mussummat Chand Kour v Iartab Singh*<sup>(1)</sup>. In the present case the plaintiff had one cause of action only namely the right to recover her share of the property on the death of her mother. The cause of action accrued to her on her mother's death. We rely on section 28 of the Civil Procedure Code and *Ishan Chunder Hazra v Rameswar Monol*<sup>(2)</sup>, *Arundo Kumar Nasler v Banomali Gayan*<sup>(3)</sup>, *Sami Chetty v Amiani Achy*<sup>(4)</sup>, *Fazudeva Shanblagi v Kuleadi Narnapar*<sup>(5)</sup>, *Mahomed v Krishnan*<sup>(6)</sup>, *Parbati Kunwar v Mahomed Fatima*<sup>(7)</sup>. The lower Court relied upon *Kachar Bhaj Vaisa v Bas Rathore*<sup>(8)</sup> and *Gaieshi Lal v Khairati Singh*<sup>(9)</sup> for holding that the suit was bad for misjoinder. But the first case is clearly distinguishable. It was not a suit for possession. Therein a declaration was claimed during the lifetime of the widow and the cause of action accrued to the reversioner for a declaration with respect to each of the aliena-

(1) (1888) L R 15 I A 1 P 15 158

(2) (1897) 4 Cal 331

(3) (1903) 29 Cal 81

(4) (1873) 7 Mad H C P 263

(5) (1884) 11 Mad H C P 290

(6) (1887) 11 Mad 106

(7) (1907) 29 All 267

(8) (1883) 7 Bon 259

(9) (1891) 16 All 29



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tion that was made. The second ruling is no doubt against us, but it does not seem to have been followed in any later case. It is a ruling of the Allahabad High Court and that Court refused to follow it in *Parbati Kunwar v Mahmud Fatima*<sup>(1)</sup>

The finding of the Judge in appeal as regards adverse possession is clearly wrong. Neither of the exhibits relied upon by him supports the finding. He finds that Parvatibai was the guardian of her son and daughter in law. If that be so, then evidently her possession could not be adverse to her wards until she renounced her character as their guardian and held adversely to them. Moreover, the Judge has recorded the finding of adverse possession under the issue as to limitation. This is wrong. Under that issue we had only to show that our suit was in time under Article 141, Schedule II, of the Limitation Act. The Judge should have raised a distinct issue relating to adverse possession and should have given an opportunity to the parties of adducing evidence thereon. It raises a question of title and requires a specific issue.

*S. S. Patkar* for respondents 1, 6, 20, 21 and 22 (defendants 1, 6, 20, 21 and 22) —The suit is bad for misjoinder of causes of actions. The defendants are interested in different lands and the causes of actions against them are not triable jointly, severally or in the alternative in respect of the same matter. Section 28 of the Civil Procedure Code cannot apply because the right to relief is not alleged severally against the defendants in respect of the same matter. The defendants claim under different alienations. The plaintiff alleges in the plaint that the different alienations are not binding on her. The expression "in respect of the same matter" in section 28 means one entire subject-matter in the whole of which the defendants are liable jointly, severally or in the alternative. We rely on *Kachar Bhoj Vajra v Bai Rathore*<sup>(2)</sup> which rules that the different alienations by the widow are distinct causes of action which could not be joined together in one suit. The case of *Ganesha Lal v Khaurat Singh*<sup>(3)</sup> which follows *Narsingh Das v. Mangal*

(1) (1907) 29 All 267

(2) (1883) 7 Bom 230

(3) (1894) 16 All 273.

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*Dubey*<sup>(1)</sup> is on all fours with the present case. The expression "cause of action" comprises not only the plaintiff's title when in issue, but amongst other things the wrongful possession of the separate sets of defendants or any two of the sets in the alternative in respect of the same matter *Ganesht Lal v Khairati Singh*<sup>(2)</sup>. With regard to the view of the Madras High Court as to the desirability of deciding the whole question in order to secure soundness of the particular decision and avoidance of discordant decisions in different cases on facts nearly the same the Allahabad High Court observes on the other hand in *Ganesht Lal v Khairati Singh*<sup>(3)</sup> that the decision as to the rights of one person might be affected by the rights of another alienee. The ruling in *Kachar Bhoj Lajja v Bai Rathore*<sup>(4)</sup> is opposed to *Sadu bin Raghv v Pam bin Govind*<sup>(5)</sup>. We rely also on *Sudhendu Mohun Roy v Durga Das*<sup>(6)</sup> and *Rari Narain Dutt v Annola Prasad Joshi*<sup>(7)</sup>. In the present case there is no allegation of collusion between the defendants. We also rely on *Mussammat Gopal Devi v Jat Narain*<sup>(8)</sup>. Then again there are different causes of actions against several alienees and these causes of actions are joined with the cause of action against defendant 24 for partition.

We take our stand on sections 31, 45 and 53 clause (3) of the Civil Procedure Code. The suit is therefore bad for misjoinder of causes of action.

With regard to the question of adverse possession the issue that was raised in the first Court was—“Is the claim within time?” If the claim of Subraya and Mathurani was barred as against Parvati she got title by prescription under section 28 of the Limitation Act and there was a statutory conveyance to her. Therefore the alienees of Parvati got absolute title. The Subordinate Judge found that Parvati's possession was adverse to her son Subraya and his widow Mathura. In the appeal Court, the appeal being summarily dismissed, the defendants

(1) (1892) 5 All 103

(2) (1894) 13 All 270

(3) (1893) 7 Bom 287

(4) (189) 16 Bom CJS 11 p. 612

(5) (1897) 14 Cal 435

(6) (1897) 14 Cal 681

(7) (1903) P L No. 1 of 1903 (Cir J

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were not heard, therefore the finding that Parvati was guardian is not binding on us. The Judge in appeal, however, found as a fact that Parvati's possession was adverse. Exhibit 284 says that when Subrayn died he was about 20 years old. So the time having once begun to run in Subraya's lifetime it could not be stopped by the minority, if any, of Mathura. Further, the plaintiff admits in her plaint that Parvati enjoyed and disposed of the property since the death of Mangba, which took place in 1852. Further, Pundlik being adopted by Parvati's brother the adoption was invalid and Pundlik remained the son of Mangba. Therefore the possession of Parvati was adverse to the two owners Subraya and under him his widow Mathura and also Pundlik. Besides Parvati had got the *halas* transferred to her name. Lastly, the plaintiff should not be allowed to elect according to *Kachar Bhoj Vajya v. Bai Rathore*<sup>(1)</sup>

*S. A. Hatyanga* for respondents 18 and 19 (defendants 18 and 19). —The determination of the question of misjoinder must depend for the most part upon the frame of the plaint. In the present case the plaintiff sets out briefly the various alienations under which the defendants claim and wants to have them set aside. This is therefore, in substance a suit for a declaration that the several alienations are bad as against the plaintiff. The lower Courts were thus right in applying the case of *Kachar Bhoj Vajya v. Bai Rathore*<sup>(1)</sup>. It was contended that the plaintiff's claim against the several defendants was 'in respect of the same matter' and that the suit was allowed by the terms of section 28 of the Civil Procedure Code. According to that contention "the same matter" would mean the estate to which the plaintiff was entitled as heir. If that is so then the contention is not sound. We submit that 'the same matter,' that is, the estate is, as it were a constant quantity, and as each of the defendants, according to the statement in the plaint, is interested in a fragment of the estate, it cannot be said that the right to relief is claimed against the defendants severally in respect of 'the estate' that is the whole estate, unless the words such as "the whole or part of" are interpolated after the words "in

respect ' in section 28 It is not suggested that any relief is claimed against the several defendants in the alternative Nor can it be argued that they are jointly liable because no combination or conspiracy is alleged *Sudhendu Mohun Roy v Durga Das*<sup>(1)</sup>, *Ram Narain Dut v Annola Prosad Joshi*<sup>(2)</sup> The rulings in *Ishan Chunder Hazra v Rameswar Mondol*<sup>(3)</sup>, *Nundo Kumar Nasler v Banorati Gayan*<sup>(4)</sup> and *Parbati Kunwar v. Mahmud Fatima*<sup>(5)</sup>, which were relied on, do not apply because therein the suits were differently framed The *ratio decidendi* of those cases would appear to be that the question of misjoinder would not arise simply because different defences are raised by the defendants Here, however the plaint itself wants that the several alienations should be set aside Those cases are therefore distinguishable on this ground The reason of the decision in *Vasudeva Shanbhaga v Auleads Narnapai*<sup>(6)</sup> is that it is desirable to go into several alienations at one and the same time because one might affect the propriety or legality of the other or others. In the present case, however the alienations range over such a long period and the interval between the several alienations is so great that that consideration does not arise. Moreover, it is not correct to say that there is one cause of action in the present case The plaintiff's title to the whole property is, no doubt, the same But that circumstance does not constitute the cause of action. The cause of action against each of the defendants is by virtue of his independent wrongful possession, and no combination having been alleged to exist among the defendants, the causes of action are different They cannot, therefore, be joined in one suit *Ganesh Lal v Khairati Singh*<sup>(7)</sup>, *Kachar Bhoj Vajra v Bai Rathore*<sup>(8)</sup>, *Sudhendu Mohun Roy v Durga Das*<sup>(1)</sup>.

As regards the finding that the widow Parvatibai was the guardian of the owners who were minors, there is no legal evidence on the point The only legal evidence is to the effect that they were not minors Therefore the finding of adverse possession is good

(1) (1837) 14 Cal 435

(2) (1837) 14 Cal 681

(3) (1897) 21 Cal 831.

(4) (1902) 29 Cal 571

(5) (1907) 29 All 207.

(6) (1871) 7 M.L.H.C.B. 200.

(7) (1894) 16 All 770

(8) (1893) 7 Ben 250

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for the purposes of this suit the difference is, we think, not material. The course of decisions in the different High Courts as to the propriety of joining in one suit for possession alienees of different portions of the same estate claiming under the same alienor has not been uniform, but according to the present state of authority the High Courts of Calcutta, Madras and Allahabad would permit such a suit to proceed. See *Sami Chetti v Amman Achy*<sup>(1)</sup>, *Vasudeva Shrinbhaga v Kulcardi Nannapai*<sup>(2)</sup>, *Mahomed v. Krishnan*<sup>(3)</sup>, *Ishan Chunder Harra v Rameswar Mondol*<sup>(4)</sup>, *Nundo Kumar Nasker v Banomali Gayan*<sup>(5)</sup>, *Parbati Kunwar v Mahmud Fatima*<sup>(6)</sup>.

The lower Courts and the respondents in this appeal have relied upon *Kachar Bhoj Vajja v Bai Rathore*<sup>(7)</sup> but that was not a suit for possession. As pointed out in *Gledhill v Hunter*<sup>(8)</sup>, an action for the recovery of land, or as it is called in the Civil Procedure Code, section 14, 'a suit for the recovery of immoveable property,' is possessory and of a different nature to a suit for the establishment of title not claiming possession, although a claim for declaration of title is part of the machinery for establishing the right to possession might be joined with a suit for recovery of land. "The claim for a declaration of title and the claim for possession are not the cause of action they are only a statement at full length of what the cause of action really is, namely, to recover the land."

In our opinion the law applicable to the present case is correctly stated in the two Calcutta cases we have above referred to. In the latter of the two it is said "The cause of action of a plaintiff suing in ejectment cannot, so far as we can perceive be affected by the title under which the defendant professes to hold possession. It matters not to the plaintiff how the defendant may explain the fact that he is in possession or seek to defend his possession. What concerns the plaintiff is that another is wrongfully in possession of what belongs to him, and that fact

(1) (1873) 7 Cal H C R 263

(2) (1874) 7 Mad H C R 290

(3) (1887) 11 Mad 106.

(4) (1837) 21 Cal 8\*1

(5) (1902) 29 Cal 871

(6) (1907) 23 All 267

(7) (1873) 7 Bom 289

(8) (1880) 14 Ch. D 492 at p 500

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gives him his cause of action. If this is so, where there is but one person in possession, can there be a difference when the land is in the possession of more than one? We think not. It appears to us, so far as the plaintiff's cause of action is concerned, that it is a matter of indifference to him upon what grounds the different persons in possession may seek to justify the wrongful detention of what is his. What he is entitled to claim is the recovery of possession of his land as a whole and not in fragments."<sup>(1)</sup>

In the present case the land in suit is situated in several different villages, but provided the venue for the trial is the same, the right of the plaintiff to have his claim tried in one suit is the same as if the different holdings were all in the same village. It was never any bar to a suit in ejectment that many persons were in possession. The only possible objections were on the ground of inconvenience. "When the tenants claimed, and the tenants thereof, are numerous, it is frequently advisable to bring two or more distinct ejectments, rather than one action against all of them for the whole of the property. The exercise of a sound discretion and judgment on this point may sometimes save much trouble." See *Cole on Ejectment*, p. 76.

In the lower Court any difficulties arising from variety of defences can be cured by the successive trial of the issues separately affecting different defendants. Compare the rules of the Supreme Court in England O. in rule 28.

As regards the question of adverse possession we think it should not have been discussed at all upon the 6th issue. It is a question of title requiring a specific issue. The discussion of the question in the judgment of the first Court was very unsatisfactory probably for want of evidence resulting from the absence of a definite issue. The Subordinate Judge mentions exhibits 281, 300 and 310 as justifying his conclusions. As regards exhibit 281 the record of the Court in Canarese differs from the Judge's note. The Canarese says that after Mangba's death the *rakiva* was carried on by Parvati till her death. This is quite consistent with management as guardian or as senior member of the family without any adverse possession. Exhibit 300 is a

(1) (1912) 29 Cal 571 at p. 580

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rent note passed in 1858 to Parvati by a yearly (*chalgani*) tenant Exhibit 310 is an entry in the revenue records of payment to Parvati in 1865 for land taken up for a railway. These exhibits are quite consistent with a management of Parvati on behalf of junior members of the family In the lower appellate Court the point was still more inadequately dealt with The District Judge assumes that Parvati was guardian of the owners at the dates of the alienations effected by her If this was so, the presumption would be that she effected the alienations honestly as guardian and not dishonestly in breach of her trust The Subordinate Judge had held, and we assume that in dismissing the appeal summarily the District Judge adopted the finding of the first Court, that Subraya had died in 1853 or 1854, i. e., prior to any of the alienations But alienations by the guardian during the lifetime of Subraya's widow who was the owner of only a limited estate would not prejudice the reversioners unless justified by necessity.

We set aside the decree and remand the case for re trial The lower Court should not fail to raise a specific issue as to adverse possession and should consider whether any inconvenience will result from trying the suit against all the defendants at once or whether it should direct the successive trial of the issues separately affecting different defendants Following the English practice interlocutory judgments may if the plaintiff succeeds be given against the different defendants as their cases are disposed of, final judgment for possession of the whole property being reserved till the conclusion of the trial of the whole case. Costs costs in the cause

*Decree set aside and case remanded*

O R R

## APPELLATE CIVIL

*Before Chief Justice Scott and Mr Justice Batchelor*

**VACHHANI KESHABHAI AND OTHERS (ORIGINAL PLAINTIFFS) APPLICANTS, v VACHHANI NAMBHA BAJAJI AND OTHERS (ORIGINAL DEFENDANTS) OPPOONENTS \***

1903.

November 26

*Suits Valuation Act (VII of 1837) section 8—Suit for declaration and consequential relief—Valuation—Court fees—Jurisdiction—Plus of the relief stated in the plaint*

In a suit for declaration and consequential relief (injunction) with respect to land the Court must accept the value of the relief stated in the plaint for the purpose both of the Court fees and jurisdiction.

*Hari Sankar Dutt v Kati Kaur; Patil* followed.

*Dayaram v Gordhandas* distinguished.

APPLICATION under the extraordinary jurisdiction, section 622 of the Civil Procedure Code (Act XIV of 1882), against the decision of N R Majmundar, Joint First Class Subordinate Judge of Ahmedabad with appellate powers, confirming the order passed by N V. Desai, Second Class Subordinate Judge of Dhanduka and Ghogho, returning a plaint for presentation to the proper Court.

The plaintiffs brought a suit against the defendant in the Court of a Second Class Subordinate Judge and prayed for the following reliefs:—

- (a) A declaration that they were owners of a three fourths share of certain lands called the *Bhathadani Patil* and the income thereof that might be in deposit with the Talukdars Settlement Officer and also of a three fourths share of  $8\frac{1}{2}$  *doldis* of the village site and of every other sort of income from the village of Machand.
- (b) Recovery of Rs 637-8-0 on account of their share in the income of the said *Patil* for the Samvat years 1956 to 1960, and
- (c) A perpetual injunction restraining the defendants from preventing them from jointly managing the property in dispute.

\* Appeal on No. 61 of 1903 under extraordinary jurisdiction.

(1) 1903; 3 L. Cal. 74

(2) (10) 31 B. m.



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The first relief was valued at Rs 130, while the second and the third were valued at Rs 637 8-0 and Rs 25 respectively

The defendants answered that as the value of the property in suit was over Rs 5,000 the Second Class Subordinate Judge's Court had no jurisdiction to entertain the suit. The Subordinate Judge allowed the defendant's contention and returned the plaint for presentation to the proper Court.

On appeal by the plaintiffs the Appellate Court confirmed the order for the following reasons:—

But the important question is whether the jurisdiction of the lower Court is ousted on this account. The answer to this question depends upon the interpretation that might be put upon section 8 of the Suits Valuation Act, 1887. The suit is governed by section 7, paragraph 4 clauses (c) and (d), of the Court Fees Act as it is a suit for declaration coupled with consequential relief (see I L R. 10 Bom 60 I L R 17 Bom. 56), and the plaintiff is at liberty to value the reliefs he seeks at any amount he chooses and to pay the Court fee on such amount (I L R. 19 Bom 198 and I L R. 17 Bom 56). Section 3 of the Suits Valuation Act, 1887, empowers the Local Government to make rules determining the value of land for purposes of jurisdiction in the suits mentioned in the Court Fees Act, 1870 section 7, paragraphs v and vi, and paragraph x, cl. (d) and section 4 provides that when a suit mentioned in the Court Fees Act 1870 section 7, paragraph 4 or Schedule II, Article 17, relates to land or an interest in land of which the value has been determined by rules under the last foregoing section, the amount at which, for purposes of jurisdiction, the relief sought in the suit is valued, shall not exceed the value of the land or interest as determined by those rules. Section 8 lays down that when in suits other than those referred to in the Court Fees Act, 1870, section 7, paragraphs v, vi and ix, and paragraph x, cl. (d) Court fees are payable *ad valorem*, under the Court Fees Act 1870, the value as determinable for the computation of Court fees and the value for purposes of jurisdiction shall be the same. It seems to me that when rules are framed under section 3 of the Suits Valuation Act, 1887, the plaintiff, who asks for a declaration and consequential relief though he is at liberty to value the relief at any amount he likes and pay Court fee on that amount, cannot put a higher value upon his suit than that determined by those rules. Where no such rules are made the value as determinable for the computation of Court fees and the value for purposes of jurisdiction is to be the same. No rules have been promulgated by our Local Government under section 3 of the Suits Valuation Act 1887, and the discretion of the plaintiff is left unfettered. In I L R 17 Bom. 56, which was a case of declaration and consequential relief, it was held as I have already said that the valuation of the relief sought for computing Court fees rested with the plaintiff and not with the Court, and in other suits falling under section 7, paragraph 4, of the Court Fees Act, 1870, the plaintiff

was allowed to put his own value upon the reliefs claimed, and it was held that the amount paid by him also determined jurisdiction (I L R 12 Bom 675, I. L. R. 19 Bom 198) It would seem therefore that according to those decisions the amount paid by the plaintiff in a suit in which a declaration and consequential relief is prayed for should determine the jurisdiction, and the High Court of Calcutta has so held (I L R 32 Cal 734). But our own High Court in 8 Bom L R 885 has recently held that though a suit in which declaration and consequential relief are sought is governed by section 8 of the Suits Valuation Act 1857, the term 'determinable' used in that section means "determinable by the Court which has to try the case," and I am bound to follow this decision.

Plaintiffs preferred an application under the extraordinary jurisdiction, section 622 of the Civil Procedure Code (Act XIV of 1882)

*F G Ajinkya* for the applicants (plaintiffs) —We come up in revision on the ground that the first Court, which alone had the jurisdiction to try the suit, was wrong in passing the order for the return of the plaint for presentation to the proper Court. That Court refused to exercise the jurisdiction which was vested in it to entertain the suit. Our suit is one for declaration and injunction which has been held to be a proper consequential relief. Our claim is therefore governed by section 7, sub-section (4), clause (c), of the Court-Fees Act, which lays down that the *ad valorem* Court-fee leviable in suits coming within the clause would be determined by the valuation put down by the plaintiff. Along with the said section may be considered section 8 of the Suits Valuation Act which shows that in suits falling under section 7, sub-section (4) clause (c), the valuation for Court-fees and jurisdiction would be the same. It has been ruled over and over again by this Court that the amount put by the plaintiff in a suit in which declaration and consequential reliefs are prayed for should determine the jurisdiction. *Khushalkand Mulchand v. Nagindas Motichand*<sup>(1)</sup>, *Great Indian Peninsula Railway Company v. Russell Chandmull*<sup>(2)</sup>. In the present case no rules as contemplated by section 4 of the Suits Valuation Act have been framed by Government, and so long as no rules are framed the suit would be governed by section 8 of the Act, and that section lays down that the value determinable for Court fees and jurisdic-

(1) (1888) 12 Bom 675.

(2) (1894) 19 Bom 165.

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tion would be the same, and as the plaintiff is the person who is to value the claim for the purposes of Court fees, the value put down by him would determine the jurisdiction. The whole law on the point is discussed by the Calcutta High Court in *Hari Santer Dutt v Kali Kinar Patra*<sup>(1)</sup>. We therefore submit that the lower Courts wrongly held that the suit was not within the pecuniary jurisdiction of the Second Class Subordinate Judge.

*M. N. Mehta* for the opponents (defendants) —We submit that though the suit is one for declaration and injunction the plaintiff is not the sole arbiter of the valuation to be put down for determining the jurisdiction of the Court. The word "determinable" occurring in section 8 of the Suits Valuation Act would mean as determinable by the Court. The Court is not deprived of its jurisdiction to go into the question whether the value put down by the plaintiff is sufficient or not. *Bordya Nath Adya v Makhan Lal Adya*<sup>(1)</sup>, *Musst Bibi Umatul v Musst Nanji Koer*<sup>(2)</sup>. There is a ruling of our Court in *Dayaram v Gordhandas*<sup>(3)</sup> which lays down that the valuation to be determined under section 8 of the Suits Valuation Act should be determined by the Court, and so long as that ruling stands the lower Courts are bound to follow it. Besides section 12 of the Suits Valuation Act gives ample power to the Court to go into the question of valuation, and in this case the Court has exercised that power and has, after taking evidence, come to the conclusion that the value of the subject matter was over Rs 5,000, and therefore under section 24 of Act XIV of 1860 the Court of the Second Class Subordinate Judge had no jurisdiction to entertain the suit.

*Ajinkya* in reply —The case of *Bordya Nath Adya v Makhan Lal Adya*<sup>(1)</sup> was for partition. The ruling in *Musst Bibi Umatul v Musst Nanji Koer*<sup>(2)</sup> was not under the Suits Valuation Act. The case of *Dayaram v Gordhandas*<sup>(3)</sup> is clearly distinguishable as in that case possession was one of the consequential reliefs asked for.

(1) (1905) 37 Cal 731

(2) (1870) 17 Cal 680

(3) (1907) 11 Cal W N 715

(1) (1906) 31 Bom 73.

(2) (1900) 17 Cal 680

(3) (1907) 11 Cal W. N 715

SCOTT, C. J. :—The question that we have to decide is whether in a suit for a declaration and consequential relief the Court must accept the value of the relief stated in the plaint for the purpose both of the Court-fees and jurisdiction.

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We think that the words of section 8 of the Suits Valuation Act VII of 1887 lead to that conclusion; and we find that this was the view taken by the Calcutta High Court in *Hari Sanker Dutt v. Kali Kumar Patra*<sup>(1)</sup>.

We have been pressed by a decision of the Court in *Dayaram v. Gordhandas*<sup>(2)</sup>, but that is a case which is clearly distinguishable, because the learned Judges there treated it as a suit in which there was a claim for possession.

We, therefore, make the rule absolute and set aside the order of the lower Court with costs.

*Rule made absolute.*

G. B. R.

(1) (1905) 32 Cal 731.

(2) (1906) 31 Bom 73

## APPELLATE CIVIL

*Before Chief Justice Scott and Mr. Justice Chandavarkar.*

GANESH MORESHWAR JOSHI AND ANOTHER (ORIGINAL DEFENDANTS 3 AND 4), APPELLANTS, v. PURSHOTTAM BALKRISHNA RODE AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS 5 AND 6) \*

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*Civil Procedure Code (Act XIV of 1882), sections 278, 282, 283 and 287—Money decree—Execution—Attachment and sale of property mortgaged with possession to a third person—Auction purchase by judgment creditor with leave of Court subject to mortgage—Suit by judgment creditor prior to confirmation of sale and satisfaction of decree for a declaration that the mortgage was fraudulent and without consideration—Purchase—Equity of redemption—Estoppels binding upon judgment debtor.*

Plaintiffs obtained a money decree against their debtor and in execution attached the debtor's immoveable property which was already mortgaged with possession to a third person. At the auction-sale the plaintiffs themselves purchased the property with the leave of the Court subject to the mortgage.

\* Second Appeal No. 166 of 1907.

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Before the sale was confirmed and the decree was satisfied the plaintiffs having brought a suit for a declaration that the mortgage was fraudulent and without consideration it was contended that the plaintiffs were no longer judgment creditors but purchasers and that what was attached and sold was equity of redemption therefore the purchasers could not claim more than they bought.

*Held* that as the suit was brought before the confirmation of the sale and the satisfaction of the decree, the plaintiffs were judgment creditors and not purchasers

*Held* further that the plaintiffs under their purchase were not purchasers of merely the equity of redemption and were not bound by estoppels which would have bound the judgment-debtor. There is nothing to prevent such a purchaser from benefiting by the clearance of any claim upon the property even if he has himself to sue to procure it. He may alike displace a fraudulent and redeem an honest mortgage

SECOND appeal from the decision of Gulabdas Laldas, First Class Subordinate Judge of Thana with appellate powers, annulling the decree of G K Kale, Subordinate Judge of Roha

The facts of the case were as follows —

On the 30th November 1899 the plaintiffs Ganesh Balkrishna Rode and his brothers got a money-decree against Vishnu Bapat father of the minor defendants 1 and 2 for the recovery of his money-debt, namely, Rs 116 and costs. In execution of the decree the property in suit along with the other property of the judgment-debtor was attached in the year 1901. Thereupon defendant 3, Ganesh Moreshwar Joshi, applied to the Court for the removal of the attachment or for an order that the property be sold subject to his mortgage on the ground that the plaintiffs' judgment debtor had mortgaged the property to him with possession for Rs 2,000 on the 12th February 1900. On the 15th November 1902 the Court ordered that the attached property should be sold subject to the mortgage lien of defendant 3. The auction-sale took place on the 23rd October 1903 when the property in suit was purchased by plaintiffs with the leave of the Court and the sale was confirmed on the 24th November 1903. In the meanwhile, that is, after the purchase by the plaintiffs but before the sale was confirmed, the plaintiff brought the present suit on the 13th November 1903 for a declaration that the property in suit was liable to be attached

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and sold in execution of his money-decree, the mortgage of defendant 3 being a sham and colourable transaction without consideration. They further prayed that the order directing them to purchase the property subject to defendant 3's mortgage be set aside. Defendant 4 was the undivided brother of defendant 3 and defendants 5 and 6 were mortgagees of some of the properties in suit from defendant 3

The guardian of defendants 1 and 4, who were minors, stated that he knew nothing about the claim

Defendants 3 and 4 contended *inter alia* that their mortgage for Rs 2,000, dated the 12th February 1900, was a genuine transaction accompanied with possession and supported by valuable consideration, that as the mortgage was passed one year before the plaintiffs' attachment it was binding on the plaintiff, that the plaintiffs' allegations were false and malicious, and that the property in dispute was not liable to attachment and sold in execution of the plaintiffs' decree so long as the mortgage was not paid off.

Defendants 5 and 6 did not appear.

The Subordinate Judge found that the mortgage in suit was not a sham transaction and was supported by consideration, that the mortgage was proved, and that the plaintiffs were not entitled to any relief. The suit was therefore dismissed.

The plaintiffs having appealed, the Appellate Court found that the mortgage was a colourable transaction without valuable consideration and that the plaintiffs' purchase at the auction-sale did not amount to an acquiescence on their part in the genuineness of the mortgage and did not estop them from praying for the declarations sought. The following is an extract from the appellate Court's judgment.—

It is, however, clear to my mind that the fact of the plaintiffs having bid at the Court-sale and become purchasers of the plaint property with full knowledge and notice of the retention of the mortgage lien on the foot of exhibit 53 in favour of defendant No 3 cannot and does not prejudice their right, even though they were the decree-holders at whose instance the property was put up to sale, to challenge the genuineness and *bona fides* of the mortgage.

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The sale of the property subject to the mortgage incumbrance was ordered by the Court in spite of the decree holders protest and opposition which were disallowed by the Court after a summary investigation in a miscellaneous proceeding under sections 278 to 281 of the Code of Civil Procedure. The very nature of the inquiry and the frame of the issues to be raised in it make it evident that the order passed does not finally dispose of the questions and the law clearly provides a remedy by way of a regular suit to render it nugatory and ineffectual if not to revise and reverse it. It is of a temporary nature, and all the important questions regarding the *boni fides* consideration, validity, etc. of the mortgage can be and are raised for determination in the suit by the dissatisfied party to the miscellaneous proceeding may the aggrieved party be an intervenor or the decree holder. The order has not the effect of *res judicata* on either side, and it does not seem lawful or equitable to find that because a decree holder abides by the Court's order for the time being allows the attached property to be sold subject to a lien and himself purchases it he has acquiesced in the order and is ever after estopped from impeaching the *boni fides* of want of consideration for the mortgage. The law leaves him open two remedies for getting the questions regarding the mortgage wholly finally tried and adjudicated on—one by a regular suit for a declaration of the nature sought in the present suit and the other by a suit of redemption, and what would be the use and object of that suit if the party suing were to be held as bound and silenced by the result of the miscellaneous inquiry which from its very character embraces two issues, one about the possession of the property attached and the other as to on whose behalf the possession was held at the time of the attachment? The incidental inquiry into consideration if one should be at all held, would be a summary and to determine only *prima facie* which of the parties should be compelled to file a regular suit. Such an inquiry therefore and the Court's order in it cannot be binding on a party to the regular suit and it is therefore that the plaintiffs cannot be held as having acquiesced in the Court's order directing the retention of lien.

They should certainly have shown diligence and not allowed the execution matter to be pushed on to sale by instituting the suit at an earlier date and obtaining a temporary injunction prohibiting the sale under section 492 Civil Procedure Code, or a stay order in the execution matter itself. It is this supineness on their part that has placed them as purchasers in an awkward position, but it cannot tend to the conclusion that they cannot challenge the mortgage on the grounds of want of consideration and *boni fides*.

The appellate Court therefore passed a decree as follows —

The question as to what relief could be awarded to the plaintiffs in this suit is not difficult to answer. Though they have succeeded in showing that the mortgage-deed (exhibit 53) does not evince a real and *boni fide* transaction they could not but admit that the property attached at their instance was at the time of its attachment subject to the mortgage of Rs. 1,000 in favour of the

Paranjpes (defendants 5 and 6) by virtue of the deed (exhibit 88) It is not in dispute that on the date of exhibit 53 the whole amount due on the foot of exhibit 88 was Rs. 1,186 1 6

The Paranjpes have been joined as co defendants from the beginning and they have not urged that they were entitled to more On the contrary their deed for Rs. 4 000 (exhibit 91) contains their admission that the sum of their mortgage dues was Rs. 1,186 1 6 and not a pie more

I therefore grant the appeal and amend the lower Court's decree The amended decree is that it be declared that the plaint property was subject to a lien of Rs. 1,186 1 6 in favour of defendants 5 and 6 on the date of its attachment by the plaintiffs and that the mortgage of the same by exhibit 53 in favour of defendants 3 and 4 is not binding on them (plaintiffs)

Defendants 3 and 4 preferred a second appeal

*M. B. Chaulal* (Government Pleader) and *G. K. Dandekar* for the appellants (defendants 3 and 4)

*N. M. Samarth* for respondents 1-3 (original plaintiffs)

*P. P. Khare* for respondents 5 and 6 (defendants 5 and 6).

SCOTT, C J.—The plaintiffs obtained a decree for money in the Pen Court against Vishnu Bapat, father of the defendants 1 and 2, and in execution attached *inter alia* the property described in the plaint being an eight anna share of a *khote* village The defendant 3 Ganesh Joshi then applied to the Pen Court for removal of the attachment or for an order that the property be sold subject to his mortgage lien, alleging that Vishnu Bapat the judgment-debtor passed to him a mortgage with possession of the attached property on the 12th February 1900 for Rs. 2,000. The Pen Court upon that application ordered that the property be sold subject to the mortgage This order was passed on the 15th November 1902.

The property was accordingly put up for sale subject to the mortgage and the plaintiffs with the leave of the Court became the purchasers On the 13th November 1903 the plaintiffs brought this suit, praying that it may be declared that the deed of mortgage is without consideration and made with intent to defraud the plaintiffs and as hollow and ineffective and that therefore the property is liable to attachment and sale The



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plaintiffs obtained a decree in the lower appellate Court. Against that decree the defendant brings this second appeal.

It is contended on behalf of the appellant that the suit is not maintainable on the ground, first, that such a suit can only be brought by a person who is still a judgment creditor and that the plaintiffs whose decree is satisfied are no longer judgment creditors but only purchasers, and, secondly, that what was attached and sold was an equity of redemption only and that the purchasers cannot claim more than they bought.

As regards the first point it is sufficient to say that the suit was brought by the plaintiffs before the sale had been confirmed, and before the decree had been satisfied and while the plaintiffs were still judgment creditors.

The latter branch of the argument is based upon a false assumption, for what was attached was the immovable property believed to be unincumbered and not the equity of redemption. An equity of redemption may be attached and sold (see *Parashram Harlal v Govind Ganesh*<sup>(1)</sup>) but that was not done in the present case. The claim made to the attached property was upon the investigation under section 278 decided in favour of a person claiming to be mortgagee in possession. Under these circumstances the attached property should have been released under section 280 (see *Kassirav R. Sahab Holkar v Vitthalidas Mangalya*<sup>(2)</sup>) and the judgment creditors should have been left to the suit allowed by section 283. The order passed by the P.C. Court was irregular, as section 282 only applies to cases of mortgages or liens created in favour of a person not in possession.

We must therefore discuss this case on the footing of a purchase at the Court sale of attached property believed to be unincumbered, a case contemplated by section 287. The purchaser under these circumstances is not bound by estoppels which would have bound the judgment debtor. See *Dinandronath Sannial v Ramkumar Ghose*<sup>(3)</sup>, *Lala Parbhu Lal v Mylne*<sup>(4)</sup> and *Bashu Chunder Sen v Fagyet Ali*<sup>(5)</sup>. There is nothing to prevent

(1) (1890) 21 Bom 226.

(2) (1881) 7 Cal 107.

(3) (1873) 10 Lam H C R 107.

(4) (1887) 14 Cal 401.

(5) (1890) 20 Cal 210.

him from benefiting by the clearance of any claim upon the property even if he has himself to sue to procure it. He may unlike displace a fraudulent and redeem an honest mortgagee.

The decision of the lower appellate Court was also attacked on the ground that the onus of proof had been wrongly thrown upon the defendant and that the finding that the mortgage was a sham transaction could not therefore stand. I, however, think it is clear that the whole of the evidence was fully discussed and considered by the lower Court. The learned Judge came to the conclusion that the surprising nature of the transaction itself and the suspicious circumstances attending it outweighed the inferences which might be suggested by the evidence of some payments having been made by the defendant to creditors of Vishnu Bapat.

It is a judgment upon a pure question of fact which is binding upon us in second appeal.

I see no reason to interfere with the decree passed by the lower Court. I would therefore confirm it and dismiss the appeal with costs.

CHANDAVAKHAR, J. —I concur

*Decree confirmed.*

G R R

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## APPELLATE CIVIL

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*Before Mr. Justice Chandavakar and Mr. Justice Heaton.*

AMRITA RAVJI RAO (ORIGINAL DEFENDANT) APPELLANT v. SHRIDHAR NARAYAN OKEL AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.\*

1

*Per*

*Adverse possession—Inverse possession between tenants in common—What constitutes averse possession—Acts of exclusive possession—Ouster*

The property in dispute belonged jointly to two brothers G and D. The plaintiffs obtained a decree on a mortgage bond against D as manager of the family, and in execution of the decree the property was sold to V. When V. sought to take possession of the property he was obstructed by G and he had to

\* Second Appeal No. 529 of 1907.

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file a suit against G to remove the obstruction. In that suit it was held on the 20th November 1880 that V was entitled to recover possession by partition of a moiety of the property. The application to execute this decree was sent to the Collector who on the 11th of December 1890 effected the partition and made over symbolical possession to V. of his share. This share was sold to plaintiff on the 18th March 1893. Meanwhile, on the 4th October 1894 G sold the whole of the property to defendant's father. The plaintiff eventually sued on the 4th October 1900 to recover possession of the property from defendant. The latter contended that the claim was barred by averse possession. —

*Held*, that to entitle the defendant to add to the period of his own adverse possession (which was admittedly less than 12 years before the date of the present suit) the period of his vendor G's possession it must be shown that the latter's possession was also adverse. That it could not be so long as the decree for partition was alive and capable of execution as against G during the period of his exclusive possession, because during that period the decree forming the basis of the mutual rights and obligations of the parties prevented them from setting up any title contradicting it and thereby giving to either a new cause of action against the other.

The question of adverse possession as between tenants in-common depends not on a severance of the tenancy in common by partition but on exclusive occupation by one co-tenant amounting to an ouster of the other.

SECOND appeal from the decision of F X De Souza, District Judge of Thana, reversing the decree passed by S A. Gupta, Subordinate Judge at Murbad.

#### Suit to recover possession of land

The land in dispute was originally the joint property of two brothers Gangadhar and Damodar. Of these, Damodar was sued on a mortgage bond, as manager of the joint Hindu family, by one Narayan, the father of the plaintiffs, in 1873. The suit was decreed, in execution of the decree the property was put up for sale and purchased by one Vishnu Ganesh. When Vishnu attempted to recover possession of the property, he was obstructed by Gangadhar and he had eventually to file a suit against the latter to remove the obstruction. The Court decided in that suit on the 29th November 1886 that Vishnu Ganesh was entitled to recover possession by partition of a moiety of the property. In execution of this decree Vishnu gave a *darkhast* to recover possession of a moiety. It was sent to the Collector for execution, who effected a partition and handed over possession of lands to Vishnu on the 11th December 1895.

On the 22nd January 1897, Vishnu sold the property to one Vinayak, who in turn sold it to the plaintiff on the 18th March 1898.

Meanwhile, on the 4th October 1894, Gangadhar sold the land to Ravi Rao (father of defendant).

The plaintiff filed this suit on the 4th October 1906 to recover possession of the property from the defendant.

The Subordinate Judge, who tried the suit, held that the plaintiff's claim was barred by time. He was of opinion that the defendant and his predecessor-in-title had been in adverse possession from the 20th of November 1886, the date of the partition-decree.

On appeal the District Judge arrived at a contrary conclusion. He held that the suit was not barred. The following were his reasons —

The Subordinate Judge holds in the alternative that time must be held to run against the plaintiff from the date of the decree (exhibit 22), viz., 20th November 1886. I am unable to follow this argument. The effect of the decree was to make plaintiff's predecessor in title Vishnu Ganesb, virtually a co-parcener with Gangadhar in place of Damodar, entitled to joint possession or rather a tenancy in common in the family property, and till the joint tenancy was severed by partition Gangadhar's possession was joint with and not adverse to the decree holder or the auction purchaser. The adverse possession of the defendant began if at all, from 11th December 1895, the date of partition, and computed from that date the period falls considerably short of the statutory period.

This view is based on the assumption that Article 144 of Schedule II to the Limitation Act XV of 1877 applies to the present case, and that I think is the article applicable but even if Article 127 or Article 137 applied, the suit would be in time, for, on the former hypothesis, the exclusion of the plaintiff would not begin till 1st October 1894, and, on the latter, the judgment-debtor would not be entitled to exclusive possession till the date of the partition.

It is thus clear that plaintiff has proved his title and that his suit is in time. But at first it seemed to me that it would be inequitable to award possession as against the defendant, who is a *bond fide* purchaser for value from one of the co-parceners and has been in possession by virtue of his purchase for nearly twelve years. But on more careful consideration I am of opinion that the defendant cannot be maintained in possession for the following reasons —

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The only ground on which the defendant can resist this suit is that he has the equity of a *bonâ fide* purchaser for value without notice in his favour. But no evidence was adduced to prove that he can claim this equity in the present case. If he purchased the land with the knowledge that it formed part of an undivided co-parcenary estate, he must have known that he was purchasing what his alienor had no right to sell and he would thus have actual notice of the defect in his title. If he purchased in ignorance, then due enquiry would have apprised him of the true character of the property he was buying and the law would impute to him constructive notice of the flaw in his title. In either case, the equity now claimed on his behalf would be non-existent.

But even assuming that the equity can be successfully claimed the plaintiff has an equal equity on his side and the legal title being in him, his title must prevail. The law is settled that a purchaser from an undivided co-parcener acquires no title to specific property, he merely acquires a right to claim a partition in which he has an equity to have the family property so marshalled as to allot the specific property to the share of the co-parcener from whom he derives his title provided this can be done without injury to the other co-parceners (*vide Udaram v Rani* 11 B H C 70, and *Ayyagari v Ayyagari* 1 L R. 25 Mad 690). In the present case, the property purchased by the defendant was not allotted to the share of his donor Gangadhar, and it is suggested that this was due to the fraud of Gangadhar himself. If this as it may, it has been decided that in the analogous case of a mortgage the mortgagee's sole remedy in similar circumstances is to proceed against the share which has been allotted to his mortgagor in lieu of the property mortgaged (*Bygnath v Ramooden*, 1 I A. 106, *Hem Chander Thako Mont*, 20 Cal 533, *Amalal v Chanlan*, 24 All. 493). By parity of reasoning I would hold in the present case that defendant's sole remedy is to proceed against the share of Gangadhar for compensation.

The defendant appealed to the High Court.

*B. V. Vidwan* for the appellants.—We are entitled to tack Gangadhar's possession to our own adverse possession. Gangadhar did not hold the property on Vishnu's behalf, and the passing of the partition decree did not change the character of that possession. He was in the position of a vendor who remains in possession after the sale: such a possession has been held to be adverse to the purchaser *Anand Coomars v. Ali Jamin* (1)

In the present case the *darkhast* under which Vishnu obtained the symbolical possession was presented subsequently to our purchase, and so the *darkhast* and the granting of symbolical

possession do not affect us, who are third parties see *Juggobundhu Mukerjee v. Ram Chunder Bysack*<sup>(1)</sup> and *Harjivan v. Shivarar*<sup>(2)</sup>.

The view of the lower appellate Court that Vishnu by his decree became virtually a co-parcener with Gangadhar and that Gangadhar's possession would not be adverse till Vishnu came to know of his ouster or exclusion is obviously not correct, because a stranger cannot become a co-parcener and cannot claim his privileges. *Ram Lakhi v. Durga Charan*<sup>(3)</sup>

*J. R. Ghaipure* for the respondents —We submit that the decree of the lower appellate Court is right. The appellant is a purchaser from Gangadhar. He will either be subject to the equities and legal defences that existed against Gangadhar or will take free from all such equities. In the former case, as Gangadhar's physical possession itself was not enough to complete his title against us, defendants claiming through him cannot be in a better position. In the latter case, if he claims independently of Gangadhar and in his own right, his possession not being for twelve years is not adverse.

None of the cases cited for the appellant apply here as they are cases before execution.

CHANDIVANKAR, J.—The facts upon which the question of adverse possession, arising on the second appeal, turns, are found and stated as follows in the judgment of the lower appellate Court —

The plaintiff (S. No. 17. Fol. No. 1) along with other lands was originally the joint property of two brothers Gangadhar and Damodar.

One Narayan the father of the plaintiffs, obtained a decree in Regular Suit No. 35 of 1873 against Damodar on a mortgage-bond, and in execution of that decree, in Darkhast No. 699 of 1875 he brought the property to sale. The property was purchased by Vishnu Ganesh. The suit had been instituted by Narayan against Damodar as manager of the joint Hindu family. Gangadhar, however, obstructed the purchaser, Vishnu Ganesh, in taking possession, whereupon the latter instituted Regular Suit No. 178 of 1877 against Gangadhar to remove the obstruction. The District Court decided in appeal in that

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(1) (1880) 5 Cal. 584.

(2) (1834) 19 Bom. C.O.

(3) (1885) 11 Cal. 630.

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suit that Vishnu Ganesh was entitled to recover possession by partition of a moiety of the property. The date of this decision was 29th November 1886 (vide exhibit 22).

In execution of this decree, Vishnu gave a Daykash No 344 of 1891 to recover possession of a moiety. The Daykash was sent to the Collector for execution and the Huzur Surveyor, in effecting a partition, handed over to Vishnu possession of the plaint land (Survey No 17, Pot No 1) and other survey numbers on 11th December 1895. Exhibit 23 is the possessory receipt issued by Vishnu in token of having obtained possession.

On 22nd January 1897 Vishnu sold the property to one Vinayak Mahader and he in turn sold it to plaintiff 1 on 18th March 1898 under a sale-deed (exhibit 16). That is the title deed under which the plaintiff claims.

Meanwhile, on 4th October 1894, Gangadhar has sold the plaint land to the defendant's father under a sale-deed (exhibit 20).

The learned Subordinate Judge, who tried the suit, held that the plaintiff's claim was barred, because the defendant, and before him his vendor, had been in adverse possession from the 29th of November 1886, the date of the partition decree. On appeal by the plaintiff, the learned District Judge, differing from the Subordinate Judge, has held that the period commen-

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followed in *Gangadhar v. Parashram*<sup>(1)</sup>, that "to constitute an adverse possession as between tenants in-common there must be an exclusion or an ouster," and "exclusive receipt of profits continuously for a long period may point to an ouster but the Court must be satisfied that such taking of profits is an indication of a denial of rights in the other co-tenant to receive them." The question of adverse possession depends, therefore, not on a severance of the tenancy-in-common by partition but an exclusive occupation by one co-tenant amounting to an ouster of the other.

In the present case, the decree for partition which was obtained by Vishnu Ganesh (under whom the plaintiff claims) on the 29th of November 1886 against Gangadhar, established his right to a moiety of the property and to get that moiety separated and allotted to him. Under ordinary circumstances the continuance of Gangadhar in possession to the exclusion of Vishnu Ganesh would have been adverse from that date, and the defendant, who claims under a purchase from Gangadhar, would have been entitled to tack on the period of the latter's exclusive occupation to his own, so as to perfect his title to the property by adverse possession for more than twelve years as against Vishnu Ganesh and those claiming under him. But to entitle the defendant to add to the period of his own adverse possession (which is admittedly less than twelve years before the date of the present suit) the period of his vendor Gangadhar's possession it must be shown that the latter's possession was also adverse. That it could not be, so long as the decree for partition was alive and capable of execution as against Gangadhar during the period of his exclusive occupation, because during that period the decree forming the basis of the mutual rights and obligations of the parties prevented them from setting up any title contradicting it and thereby to either a new cause of action against the other. Suppose during the period that the decree was alive and capable of execution, the judgment debtor Gangadhar, who was in possession, had repudiated his liability thereunder and claimed the property as his own. That could not have given Vishnu Ganesh

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a fresh cause of action or the right to sue him afresh in ejectment, because, his right having been established by the decree he could proceed in execution without any fresh suit. It is not contended before us, nor does it appear to have been urged in either of the Courts below, that on the 11th of October 1894, when Gangadhar sold the property to the defendant, the decree had been barred so as to become incapable of execution and to free Gangadhar from his liability under it. As a matter of fact, the decree was subsequently executed by the Collector according to law, with the result that, as against Gangadhar, Vishnu Gaoesh was allotted his divided moiety and put in possession on the 11th of December 1894. No doubt that possession was symbolical and would not bind the defendant, who was then in actual possession under his deed of purchase of a prior date. But so far as Gangadhar was concerned, it was otherwise, his possession of the property was subject to his liability under the decree and could in no sense become adverse to the decree holder during the period when his right to execution of the decree had not become barred. The defendant cannot, therefore, invoke the aid of the possession of his vendor to support his plea of a title acquired by adverse possession. Such possession could begin, if at all, only when Gangadhar, in spite of his liability under the decree, sold the property to the defendant, and the defendant's occupation of the land commenced. Whether, even then, the defendant's possession became adverse from that date, need not be decided, because assuming it was, the suit was brought within twelve years from then. For these reasons the decree must be confirmed with costs.

HUTTON, J. — The predecessor of the plaintiff, who sues for possession, obtained a decree for possession, after partition, of the half of a property. This decree was against one Gangadhar who was in possession of the whole property and who after the partition decree, but before its execution, sold the property to the defendant and placed him in possession. So defendant was in actual possession of the whole, when partition was made in execution of the decree and plaintiff's predecessor was formally placed in possession of the half he was under the decree entitled to. Thereafter neither the plaintiff nor his predecessor converted the

formal into actual possession and the defendant remained in actual possession of the property. The latter had not had actual possession for twelve completed years when the suit was filed but seeks to add on to his own actual possession that of Gangadhar and call the whole averse. The facts being as they are he cannot do this. When plaintiff's predecessor executed the decree by having his share of the property separated and formally given over to him he perfected his claim.

From that moment a new condition of things came into existence, new rights arose and amongst them, that of the decreeholder to take actual possession of his separated share. This was not a right continued or derived from any previous holder of the land but a new right unlike any which previously existed. No possession prior to its inception could be averse to that right. Therefore no case of title in the defendant based on adverse possession is established.

*Decree confirmed*

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The word 'appears' in the section does not involve 'appear to the eye'. It is sufficient if it appears to the Commissioner on the representation of a competent officer whose duty it is to make such representations. But the Commissioner's action when 'it appears' is judicial so that he must exercise his discretion in determining what action should be taken. It is not sufficient that he should merely sign a notice which was sent to him by the Executive Engineer because it had previously been signed by that officer. It should be considered as a notice to show cause. It is not invalid, at the same time it cannot deprive the person served with it of his right to object unless the legislature has clearly deprived him of such a right.

Danger means peril, risk, hazard, exposure to injury from pain or other evil and can vary in degree according as the apprehended injury is expected to occur at once or at some future time. Section 354 applying to all degrees of danger and prescribing various precautionary measures to be taken to prevent injury resulting therefrom, it follows that first, the degree of danger must be ascertained, and then the appropriate precautionary measure prescribed. Where it is not suggested that the danger is imminent, a duty is imposed on the Commissioner to decide judicially what should be done to assure the safety of the public having due regard to the interest of the owner of the structure.

The discretion must not be arbitrary. *Paskoll v Passmore* 15 F. S. D. 301, *Gangubhos v. The Municipal Corporation of Bombay* (1899) 1 B. M. L. R. 754 at p. 764. But the Court is in the first instance entitled to inquire whether the discretion has been exercised. Discretion has to be exercised, first, in coming to the conclusion as to the state of the structure, and, then in fixing upon the appropriate remedy. It is sufficient exercise of his discretion in deciding what should be done to assure the safety of the public.

the steps to be taken

"action of the Court that his house was not warrant an order to pull down that would appointed by the Commissioner has not honor can exercise his discretion through an agent, but it follows that if the agent has not exercised his discretion, nor has the Commissioner, the Commissioner has the opportunity to remedy this when the owner complains

Under certain circumstances the safety of the public must be considered in priority to the right of private individuals, as in the case of imminent danger, but where there is no suggestion of imminent danger, the person affected is entitled to be heard as a matter of common justice.

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*Per CHANDAMAKRE, J.*—A pakki adatya’s liability ceases when hard cash has come into the hands of his constituent.

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*Tipnis Passaro right—Right to levy toll on exports of paddy from foreign territory—Such a right is nibandha under Hindu law—The right is immovable property—Suit to enforce the right in British Courts.* The plaintiff sued to recover from the defendant a certain sum of money on account toll leviable, under a grant from the Peshwas and known as the Tipnis P



right, on publicly exported from the territory of the Punt Such to Pen and Umber Khund in British territory. The cause of action arose admittedly in foreign territory, but it was contended the suit lay in the British Courts because the defendant resided in British jurisdiction.

*Held*, overruling the contention, that what the plaintiff claimed was an allowance granted by the Peshwa in permanence and such an allowance, whether secured on land or not, being according to Hindu law, *usbandha*, was immovable property.

*The Collector of Thana v Hari Sitaram* (1882) 6 Bom. 545, followed

*Held*, further, that this immovable property was situate, in the eye of law, in a foreign state, and that the British Court had no jurisdiction to try a suit for the determination of a right to or interest in the property, when the right was denied

*Keshav v Vinayak* (1897) 23 Bom. 22 applied

The Courts in India have jurisdiction to try actions relating to such property where the persons against whom relief is sought are living within the jurisdiction, but that is upon the ground of a contract or some equity subsisting between the parties respecting immovables situated out of the jurisdiction

KRISHNAJI v GAJANAN

.. .. (1909) 33 Bom. 373

LAND ACQUISITION ACT (I OF 1894)—*Assistant Judge hearing a claim—Value of the claim under Rs. 5000—Appeal lies to District Court and not to High Court—Jurisdiction—Practice and procedure—Bombay Civil Courts Act (XIV of 1869), sec. 16*

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Surveyors' reports—

how determined—R.

ing scheme, value of—Value of whole land, how derived from value of part—Collector's award] In cases where the valuation of land cannot be based on what the property was producing at the time of the notice of requisition, and where there have been no recent sales of the land to guide the Court, the market value must be determined by sales of similar land in the neighbourhood

The owner in claiming compensation can seek to prove either what the property would fetch if sold in one block, or what is the present value if he plotted out the property and sold it in lots.

When .. .. of such a large Court of sales .. .. give an opinion .. .. value of the w .. .. of sales the Court can be guided by the opinions of surveyors. It is necessary, however, to distinguish opinion from argument

The practice which has grown up in references under the Land Acquisition Act, 1894, of surveyors making long reports and furnishing copies to the opposite side beforehand is open to grave objection. A surveyor's opinion by itself is good evidence

When determining the value of frontage land the depth is a question of supreme importance. What is a suitable depth must primarily depend on the character of the buildings in the locality



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*Held*, overruling the contention, that what the plaintiff claimed was an allowance granted by the Peshwa in permanence, and such an allowance, whether secured on land or not, being according to Hindu law, *nisbandha*, was immovable property.

*The Collector of Thona v Hari Sitaram* (1882) 6 Bom. 546, followed.

*Held*, further, that this immovable property was situate, in the eye of law, in a foreign state, and that the British Court had no jurisdiction to try a suit for the determination of a right to or interest in the property, when the right was denied.

*Keshav v Vinayak* (1897) 23 Bom. 22, applied.

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KRISHNAJI v GAJANAN ... (1909) 33 Bom. 373

LAND ACQUISITION ACT (I OF 1894)—*Assistant Judge hearing a claim—Value of the claim under Rs. 5,000—Appeal lies to District Court and not to High Court—Jurisdiction—Practice and procedure—Bombay Civil Courts Act (XIV of 1869), see 16*

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When determining the value of frontage land the depth is a question of supreme importance. What is a suitable depth must primarily depend on the character of the buildings in the locality.

It cannot be too clearly laid down that under ordinary circumstances the value of an income producing property depends on its income irrespective of its cost, and that capital when once invested in land and buildings cannot be apportioned between them so as to give the market value of each

It cannot be taken as a hard and fast rule that back land must be worth half the frontage land

**PER CURIAM**—"Evidence of hypothetical building schemes is irrelevant to the question of finding the market value of land. The belief that an hypothetical scheme can be a guide to market value ascertained by other means is equally fallacious

The Court would be slow to differ from the Collector's offer on a matter of a few rupees except for very strong reasons such as an error on a question of principle

IN THE MATTER OF KARIM TAR MAHOMED

(1908) 33 Bom 325

**MARKET VALUE**—*Valuation—Mode of valuation when no recent sales—Compensation—Land Acquisition Act (I of 1894), sec 18* } In cases where the valuation of land cannot be based on what the property was producing at the time of the notice of acquisition, and where there have been no recent sales of the land to guide the Court, the market value must be determined by sales of similar land in the neighbourhood \*

IN THE MATTER OF KARIM TAR MAHOMED ...

(1908) 33 Bom. 325

**NIBANDHA**—*Tipnis Pansara right—Right to levy toll on exports of paddy from foreign territory—Sahakar right is nibandha under Hindu law—The right is in immoveable property—Suit to enforce the right in British Courts—Jurisdiction*

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**PAKKI ADAT AGENCY**—*Place of performance of contract by Pakki Adatya—Custom—Jurisdiction* } K., a Bombay merchant, employed S. as his agent at Akola on the pakki adat system. On K.'s instructions S. entered as his agent into certain contracts at Akola. On an agency account being taken a sum of money was found to be due from S. to K. On K. suing for this sum S. pleaded that the High Court at Bombay had no jurisdiction to hear the suit on the ground that no part of the cause of action had arisen in Bombay

*Held* in the case of *Pakki Adat* agency primarily the place of payment is the place where the constituent resides, but payment should be made in any other place if the constituent has chosen to give directions to that effect and that the High Court at Bombay had jurisdiction to try the suit

*Per CHANDAY KHADE, J.*—A pakki adatya's liability ceases when hard cash has come into the hands of his constituent

KENDARNAL & SURAJMAL

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**PRACTICE**—*Bombay Civil Courts Act (XII of 1869) sec 16—Land Acquisition Act (I of 1894)—Assistant Judge hearing a claim—Value of the claim under Rs 5000—Appeal lies to District Court and not to High Court—Jurisdiction*

See BOMBAY CIVIL COURTS ACT

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**SURVEYORS' OPINIONS**—*Objections to surveyors' reports*—*Land Acquisition Act (I of 1894), sec 19*—*Compensation*—*Mode of valuation when no recent sales*—*Market value* } Held, that in addition to the evidence of sales the Court can be guided by the opinions of surveyors It is necessary, however, to distinguish opinion from argument

The practice which has grown up in reference under the Land Acquisition Act, 1894 of surveyors making long reports and furnishing copies to the opposite side beforehand is open to grave objection A surveyor's opinion by itself is good evidence

IN THE MATTER OF KARIM TAR MAHOMEN ... (1908) 33 Bom 325

**TIPNIS PANSARE RIGHT**—*Right to levy toll on exports of paddy from foreign territory*—*Such a right is nibandha under Hindu law*—*The right is immoveable property*—*Suit to enforce the right in British Courts*—*Jurisdiction*.

See JURISDICTION .. ... 373

**VALUATION**—*Mode of valuation when no recent sales*—*Market value*—*Surveyors' opinions*—*Objections to surveyors' reports*—*Determination of value of frontage land*—*Building frontage how determined*—*Relative value of back land and frontage*—*Hypothetical building scheme, value of*—*Value of whole land, how derived from value of part*—*Collector's award*—*Land Acquisition Act (I of 1894), sec 18*

See LAND ACQUISITION ACT .. ... 325

**WORDS AND PHRASES —**

"Agriculturist," meaning of.  
See DEKKHAN AGRICULTURISTS' RELIEF ACT ... 376

"Appear" meaning of  
See BOMBAY MUNICIPAL ACT ... 334

"Danger," meaning of  
See BOMBAY MUNICIPAL ACT ... 334

"Earns his livelihood"  
See DEKKHAN AGRICULTURISTS RELIEF ACT .. ... 376

"Immoveable property," meaning of  
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formal into actual possession and the defendant remained in actual possession of the property. The latter had not had actual possession for twelve completed years when the suit was filed but seeks to add on to his own actual possession that of Ganga-dhar and call the whole adverse. The facts being as they are he cannot do this. When plaintiff's predecessor executed the decree by having his share of the property separated and formally given over to him he perfected his claim.

From that moment a new condition of things came into existence, new rights arose and amongst them, that of the decree-holder to take actual possession of his separate share. This was not a right continued or derived from any previous holder of the land but a new right unlike any which previously existed. No possession prior to its inception could be adverse to that right. Therefore no case of title in the defendant based on adverse possession is established.

*Decree confirmed.*

R R

## ORIGINAL CIVIL.

*Before Mr Justice Macleod*

THE LAND ACQUISITION ACT (ACT I OF 1894) CASES IN THE MATTER  
OF 1 GOVERNMENT OF BOMBAY, 2 KAPIMTAP MAHOMED \*

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*Land Acquisition Act (I of 1894) section 14—Compensation—Mode of valuation when no recent sales—Market value—Surveyors' opinions—Objections to Surveyors' reports—Determination of value of frontage land—Building frontage how determined—Relative value of back land and frontage—Hypothetical building scheme value of—Value of whole land, how derived from value of part—Celle's award*

In cases where the valuation of land cannot be based on what the property was producing at the time of the return of acquisition and when there have been no recent sales of the land to guide the Court, the market value must be determined by sales of similar land in the neighbourhood.





a frontage of 165 feet on Mazagon Road and 148 feet on Valpachadi Road and a mean depth of 170 feet on the Mazagon Road. At the date of the notice there was a bungalow and out houses on the land, but it is admitted that the land should be valued as vacant building land. The Collector has offered Rs 15 a square yard and the claimant considering his land to be worth Rs 25, applied to the Collector for a reference to this Court.

The valuation cannot be based on what the property was producing at the time of the notice, nor have there been any recent sales of the land to guide the Court.

The market value must, therefore, be determined by sales of similar land in the neighbourhood. From Exhibit A and other evidence that has been given it is clear that small holdings are the rule in the locality. The owner in claiming compensation seeks to prove either what the property would fetch if sold as one block, or what is the present value if he plotted out the property and sold it in lots. He has not attempted the latter course. I have therefore to decide what was the market value of this plot of land as a whole on or about the 17th November 1904. No evidence has been adduced of sales in the neighbourhood of such a large block of land, but the evidence before the Court of sales of small pieces of land in the neighbourhood enables the Court to give an opinion regarding the values of different portions of the block and the value of the whole must be deduced from these. In addition to the evidence of sales the Court can be guided by the opinions of surveyors. It is necessary however to distinguish opinion from argument. And the practice which has grown up in References under the Land Acquisition Act of surveyors making long reports and providing copies to the opposite side before the hearing appears to me open to grave objection. A surveyor's opinion by itself is good evidence. What value the Court will put on it depends entirely on the effect of the cross examination, but there is no reason why the witness should himself provide the material for his cross-examination. It will save the time of the Court if a surveyor prepares a concise description of the property to be valued, but if he is a wise man he will fill nothing

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more except his opinion of its value. If however he does give his reasons they must be based on facts and not on hypothesis.

Fortunately there is no difficulty in this case in arriving at the approximate values of frontage land on Mazagon and Valpakhar-di Roads in November 1901. Plots 2 to 6 on Exhibit A all front on Mazagon Road with a depth of about 80 feet. In March 1903 Nos 4 and 5 very similar plots measuring about 78 square yards realised at auction Rs 15 and Rs 23 a square yard respectively. The divergence in the price cannot be explained but only demonstrates public caprice. In November 1902 plot 6 measuring 890 square yards realised at auction Rs 21 a square yard. Plot 2 realised in August 1903 Rs. 37, and plot 3 in November 1907 Rs 47. There is nothing to show that land value had increased between 1902 and 1901 but undoubtedly from early in 1905 prices of land began to rise owing to the boom in the mill industry, until, as Mr Stevens said, by the end of the year almost fabulous prices were being given. This will account for the prices realised by plots 2 and 3. But sales after the date of notification must be discarded when it is proved that values have been affected one way or the other by circumstances which have arisen after that date. I have also been asked to take into consideration the amount awarded by the High Court for the property marked I on Exhibit A, but obviously I could not do so without considering all the evidence on which that award was founded. The award by itself is not evidence of the market value. Plots 8 and 9 are situated on Jail Road and though the distance from the land in reference may not be great the character of the locality is so different that the sales of those plots can be no guide in this case. When determining the value of frontage land the depth is a question of supreme importance. What is a suitable depth must primarily depend on the character of the building in the locality but in an ordinary shop and chawl locality like the one I have to deal with it has been the custom for surveyors to calculate the depth at 100 feet. In the next place the value of a building frontage must depend on the higher rents that can be obtained for the shops or rooms facing the street, and as the proportion of the rents to the lower rents of the back rooms decreases so does the value of the whole frontage land decrease. As Mr Stevens

said, the value of frontage land with a depth of 10 feet would be 50 per cent more valuable than if the depth were 100 feet, but the value of the 60 feet behind would decrease in greater proportion. A depth of 100 feet therefore has been admitted to give the best average and I am satisfied on the evidence that frontage land on Mazagon Road with a depth of 100 feet was not worth more than Rs 20 a square yard in November 1904. It follows that similar frontage land on Valpakhadi Road, a *cul de sac* with a nightsoil depot at the end would be worth less. In March 1903 plot No 7 measuring 313 square yards was sold for Rs 4,672 by Ahmadbhoy Habibbhoj to Kasun Rahimtulla Joonas. At first the purchaser thought he was buying 212 square yards for Rs 3,872 but on measurement the plot was found to measure 71 square yards more, and as the vendor disputed that this area had been sold the matter was settled by an additional payment of Rs 800. This may be regarded as an excellent instance of a bargain between a vendor who was not likely to give anything away, and a purchaser who was anxious to buy the land on account of his owning the adjoining plot.

Taking the price paid at Rs 16 as argued by Mr Robertson, it would be impossible to give a higher value for the Valpakhadi frontage of the land. But in spite of its triangular shape it will be seen that plot 7 with an average depth of less than 40 feet could be built on so that practically all the rooms front on the road, therefore a lower value must be given to frontage land having a depth of 100 feet. This may be partly balanced by the fact that the Valpakhadi frontage on the land in reference is more favourably situated and nearer Mazagon Road than plot 7. Its value would therefore be between Rs 12 and Rs 15 a square yard. With reference to the purchase of the property facing the claimant's land on the south side of Valpakhadi Road from Karmali Pribhoy, I agree with Mr Robertson that it cannot be relied upon, as it is a purchase of land and buildings, and the purchase price must have been fixed by what the property was producing. This cannot be taken as an instance of sale of land, though it may turn out that the balance of the purchase money after calculating the value of the building may approximate what a witness considers to be the value of the land. That would be a coinci-

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dence and not evidence. It cannot be too clearly laid down that under ordinary circumstances the value of an income producing property depends on its income irrespective of its cost and that capital when once invested in land and buildings cannot be apportioned between them so as to give the market value of each.

If I take into consideration these high values for the frontage land in valuing the whole plot I have over 1,000 square yards of land at the back as shown on Mr Stevens' plan (Exhibit 7). If this land is to have any value it must have access to the road and this will diminish the amount of frontage land, but I doubt very much whether the back land would have any value except as an amenity if a depth of 100 feet is allowed for frontage land. In any event if the frontage land were fully occupied a large proportion of the back land would have to be kept open. This is more probable when I consider Mr Chambers' plan (Exhibit C) of laying out the ground, as he has taken a 40 feet frontage in order to utilise the back land to the best advantage. The purchases made by Kassum Rahimtulla Joonas of three plots of land with frontages on Chinchbunder and Valpakhadi Road in 1902 are a very fair guide to the value of ordinary chawl land in this vicinity. In 1902 Kassum bought three narrow plots adjoining each other at an average of Rs 9 4 0 and built a chawl on them with shops on the frontages. I consider that the advantage of a double frontage was set off by the disadvantage due to the narrowness of the plots, and that it is fair to deduce from these sales that chawl land in this locality in 1902 was worth Rs 9 or Rs 10 a square yard provided it could be as fully built on as the land bought by Kassum Rahimtulla. Both Mr Chambers and Mr Stevens were of opinion that back land could be valued at one half the value of frontage land but it is obvious that the application of this rule depends on the character of the back land.

There are two alternatives in this case, either to take a deep frontage which must have a piece of back land of very little value, or to take a lesser frontage, which while increasing the value of the back land would at the same time increase the proportion of back land to front land. But I must decline to accept as a hard and fast rule that back land must be worth

half the frontage land. That would only lead to absurdities. Mr Robertson has argued that even accepting Mr Stevens' division of the land as shown in Exhibit 7 the Collector's award should be increased as Mr Stevens arrives at his all over figure of Rs 15 by taking the plot C at Rs 6 whereas he says in para 10 of his report (Exhibit 6) that the back land would be worth anything between Rs 6 and Rs 10 and the claimant should be entitled to the highest figure given by a witness on the opposite side. This is a perfectly fair argument which only illustrates the danger I have referred to above of a surveyor giving reasons in his report. However I understand Mr Stevens to mean that the back land in this case might be worth Rs 10 but his all over figure of Rs 15 only allows it to be valued at Rs 6 since if a frontage depth of 100 feet is taken, the back land becomes reduced to the lowest figure. If the frontage depth were reduced it would follow the back land might be worth up to Rs 10. I think Rs 0 a very full value for the back land. I regret I cannot accept Mr Chambers' opinion that this land is worth all over Rs 25. Mr Chambers before the Collector valued the land at Rs 24 solely on the basis of an hypothetical building scheme. I have already decided in an interlocutory judgment in this reference (which can be incorporated herewith) that evidence of hypothetical building schemes is irrelevant to the question of finding the market value of land. It is difficult to suppress the belief that seems to exist almost universally amongst surveyors in Bombay that market values can be ascertained in this way. Otherwise it should not be necessary to keep on giving reasons to the contrary. The belief that an hypothetical scheme can be a guide to market values ascertained by other means is equally fallacious. However much conclusions may differ, the road which leads to the determination of land values is short and straight. By the ingenuity of Counsel and surveyors' attempts, often successful, are made to divert the road on the grounds that the diversions will lead to an infallible result. They only lead to waste of time.

Mr Chambers in his report put in before me (Exhibit B) values the land at Rs 25. Apart from his scheme which seems to have been altered since it appeared before the Collector (another illustration of how complaisant these schemes are to the will of the

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moulder) he bases his opinion, like Mr Stevens, on sales, but this opinion based on sales was evidently subordinate to his opinion based on his estimate. It is impossible to deduce from the evidence of sales that this large block of land could be worth anything like Rs 20 a square yard.

Whether the depth of the frontage is taken at 40 feet and higher retail values allowed with a larger proportion of back land or the depth is taken at 100 feet and lower values allowed with a greater proportion of front land the totals come to much the same as the Collector's offer. But valuing the land as a whole it would not be correct to add up the retail values of the parts as derived from the instances of sales of small plots without making some deduction both on general principles and because the wastage must be greater than in those instances from which the retail values have been deduced. Apart from that I agree with Mr Kirkpatrick that the Court would be slow to differ from the Collector's offer over a matter of a few rupees except for very strong reasons such as an error on a question of principle. In this reference I am satisfied that the Collector has offered the full market value of the land and I dismiss the reference with costs.

One set of costs between the Government and the Municipality to be allowed as against the claimant.

The interlocutory judgment was as follows —

MACLEOD, J — I have already decided this question in what I thought sufficiently plain language in the reference of *In re Dhunjibhoy Bonanji*<sup>(1)</sup> and everything I said in that judgment on this question may be taken as incorporated in this. Mr Robertson argues that though that decision might be right in the case of a piece of land of 21,000 square yards it would not follow that it would apply to the case of a piece of land measuring 3,500 square yards. I can see no distinction. In the first place there can be no relation between the capitalized rent of land and actual buildings and the market value of the land. It follows that there can be no relation between the capitalized imaginary rents of imaginary buildings and the market value of the land. Mr Robertson has cited *In re Mervanji*

(1) (1907) 10 Bom L R 701.

*Case*<sup>(1)</sup> That case is not binding on me, though I would follow it if I could possibly agree with the decision. If it does decide that hypothetical building schemes are relevant I have already expressed my view on that question in *Dhunjibhoy's case*. These hypothetical calculations are not founded on fact. There are a number of factors each of which can be varied to an indefinite extent and therefore the permutations and combinations of these factors are practically infinite. I happen to know exactly how those calculations were made and I am perfectly aware that if Mr Chambers thought the land was worth Rs 15 a square yard he could turn out an equally plausible scheme to support that figure. Mr Robertson argues that if I disallow this scheme as irrelevant it follows I must hold any hypothetical building scheme is irrelevant. In my opinion it is. As long as opinions may differ as to the building to be put on a piece of ground, there can be no certain factor on which the valuation can be founded. That is the root of the matter. If the building is certain, &c one of which there cannot be two opinions and there may possibly be cases in which it can be, then there is no longer an hypothetical building scheme. The failure to recognize this guiding principle can only result in enormous waste of time and money.

Attorney for Government —*Mr J C G Bowen, Government Solicitor*

Attorneys for claimant —*Messrs Ardeskir, Hormusji, Dinsshaw & Co Messrs Crawford, Brown & Co.*

B N L.

(1) (1907) 9 Bom L R. 1232



## ORIGINAL CIVIL.

*Before Mr Justice Macleod*1908  
July 9LALBHAI TRICAMLAL AND OTHERS, PLAINTIFFS, v THE MUNICIPAL  
COMMISSIONER FOR THE CITY OF BOMBAY, DEFENDANT \*

*City of Bombay Municipal Act (Bom Act III of 1888), section 354†—Construction—Municipal Commissioner—Power to remove dangerous structures—Exercise of the power—"Appear," meaning of—Discretion vested in the Commissioner—Exercise of discretion through agent—Notice by Commissioner to a party to remove structure in ruinous condition—Right of the party to be heard by the Commissioner in answer to the notice—Injunction restraining Commissioner from pulling down a house*

The primary object of section 354 of the City of Bombay Municipal Act (Bom Act III of 1888) is the safety of the public to secure which the Commissioner must of necessity be given very wide powers. But it does not follow that those powers can be exercised arbitrarily and without due consideration to the provisions of the section and the right of individuals.

The word 'appear' in the section does not involve 'appear to the eye'. It is sufficient if it appears to the Commissioner on the representation of a competent officer whose duty it is to make such representations. But the Commissioner's action when 'it appears' is judicial, so that the Municipality has discretion in determining what action should be taken; that he should merely sign a notice which was sent to

\* Suit No 106 of 1908.

† Section 354 of the City of Bombay Municipal Act (Bom. A

*Dangerous Structures*

354. (1) If it shall at any time appear to the Commissioner (including under this expression any building wall or other structure affixed to or projecting from any building wall or other structure in ruinous condition, or likely to fall, or in any way dangerous to any person passing to or passing by such structure or any other structure or place in the neighbourhood thereof of the Commissioner may, by written notice, require the owner of such structure, to pull down, secure or repair such structure so as to prevent all cause of danger therefrom

(2) The Commissioner may also if he thinks fit, require the said owner by the said notice, either forthwith or before proceeding to pull down or repair the said structure, to set up a proper and sufficient board or fence for the protection of passers by and other persons with a convenient platform or space if there be room enough for the same and the Commissioner shall think it desirable, to serve as a footway for passengers outside of such board or fence

Engineer because it had previously been signed by that officer. It should be considered as a notice to show cause. It is not invalid, at the same time it cannot deprive the person served with it of his right to object unless the legislature has clearly deprived him of such a right.

Danger means peril or risk, hazard, exposure to injury from pain or other evil and can vary in degree according as the apprehended injury is expected to occur at once or at some future time. Section 354 applying to all degrees of danger and prescribing various precautionary measures to be taken to prevent injury resulting therefrom it follows that first, the degree of danger must be ascertained and then the appropriate precautionary measure prescribed. Where it is not suggested that the danger is imminent, a duty is imposed on the Commissioner to decide judicially what should be done to assure the safety of the public having due regard to the interest of the owner of the structure.

The discretion must not be arbitrary. *Parthall v. Passmore*<sup>(1)</sup>, *Gangyibhoy v. The Municipal Corporation of Bombay*<sup>(2)</sup>. But the Court is in the first instance entitled to inquire whether the discretion has been exercised. Discretion has to be exercised first in coming to the conclusion as to the state of the structure and then in fixing upon the appropriate remedy. It is sufficient exercise of his discretion in deciding what structures are dangerous if he appoints a competent person to represent to him what structures are dangerous. But if a notice is issued based on the representation of such a person, it is open to the owner to prove that that person has not exercised his discretion or has exercised it for improper motives in prescribing the steps to be taken. *Proper motives* was recognized by the Court as a proper motive in prescribing the steps to be taken. *Proper motives* was recognized by the Court as a proper motive in prescribing the steps to be taken. *Proper motives* was recognized by the Court as a proper motive in prescribing the steps to be taken.

Attorney for Government. *Solicitor.*

Attorneys for *Messrs. & Co.* *Messrs.*

circumstances the safety of the public must be considered in light of private individuals as in the case of imminent danger, if no suggestion of imminent danger the person affected is treated as a matter of common justice.

An injunction restraining the Municipal Commissioner of Bombay, his servants and agents, etc., from pulling down the plaintiff's house under sections 354 and 488 of the City of Bombay Municipal Act (Bombay Act III of 1888), as being in a dangerous and ruinous condition.

(1) 15 P. S. D. 301

(2) (1892) 1 Bom. L. R. 751 at p. 764.

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The house in question consisted of a ground floor and one upper floor and was situated in Chakla Street in Bombay and faced to the west. It ran back towards the east for more than a hundred feet and on its north side was a narrow street or lane only seven or eight feet wide called Cumbharwada Cross Lane. Ten shops on the ground floor of the house opened in this lane which was a busy thoroughfare. The front of the house opening on Chakla Street only afforded a space for two shops on the ground floor. These shops, as also those opening on the lane, were used for the sale of grain and spices. The rooms on the upper floor were used for storage except four rooms which were occupied by tenants who lived in them. The whole height of the house was only fourteen or fifteen feet. The house was said to be fifty or sixty years old and was a wooden framed building, the space between the posts of the framework being filled in with masonry chunam etc.

The plaintiffs who were the trustees of Godaji Maharaj's temple in Bombay had purchased the said house in 1904 and they applied the rents to the maintenance of the temple.

On the 6th January 1908 the plaintiffs were served with a notice under section 354 of the City of Bombay Municipal Act which stated that a portion of their said house "was in a ruinous condition, likely to fall and dangerous to any persons occupying resorting to, or passing by the same," and required them to pull down the whole of the first floor including the flooring and the roof. This notice came from the Municipal Executive Engineer's office and was signed by the Municipal Commissioner (the defendant).

On receipt of the said notice the plaintiffs had the house examined by their engineer who after examination reported that the house was in a sound condition and not at all ruinous or likely to fall. Thereupon the plaintiffs' solicitors, on the 1st February 1908, wrote to the Municipal Commissioner stating the result of the engineers examination of the house and saying that they believed some mistake had been made in sending the notice. They requested that the house should be examined by the Engineering Department of the Municipality in order to ascertain its real condition. Their letter concluded as follows —

Our clients' engineer will be glad to meet the officer of the Executive Engineers Department, who may be deputed to inspect the house and discuss the subject with him on any day which may be appointed for the purpose.

The plaintiffs received no reply to the said letter, but on the 19th February 1908 a further notice of that date was received by them signed by an officer (an Inspector) in the Executive Engineer's Department purporting to be issued under section 488 of the City of Bombay Municipal Act and stating that on the 27th February 1908 pursuant to that section he would enter the said house with workmen in order to pull down the whole of the first floor thereof including the flooring and roof as required by the previous notice of the 6th January 1908.

The plaintiffs then had the house again examined by another surveyor who also reported it to be in a sound condition. Thereupon the plaintiffs on the 25th February 1908 filed the present suit praying for an injunction restraining the Municipal Commissioner, his servants and agents from proceeding under the aforesaid notices. An *interim* injunction pending the hearing of the suit was granted on the application of the plaintiffs.

After the plaint was filed the plaintiffs obtained inspection of the Municipal documents and discovered that for a considerable time there had been a desire on the part of the Municipal Engineering Department to remove the plaintiffs' house in order to widen Cumbharwada Cross Lane which was *much too* narrow for the traffic. The plaintiffs thereupon obtained leave to amend the plaint by adding two paragraphs, alleging that the notices of the 6th January and the 19th February 1908 had been issued capriciously and oppressively without giving the plaintiffs an opportunity of satisfying the defendant that the house was not in a dangerous condition, and that they were not issued in good faith but were really issued in order to widen the Cumbharwada Cross Lane.

The case came on for hearing in June 1908.

Issues were framed raising the following points, *viz.* —

1 Whether the actual condition of the house on the 6th January 1908 justified the issue of the notice of that date "to

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*pull down* part of the house as being ruinous, etc., under section 354?

2 Whether under the said section the Commissioner's order was not final and conclusive, and whether it could be questioned in a suit?

3 Whether the notices were issued in good faith?

On the second point it was contended for the plaintiffs that in any case both the orders were bad as both were made by the Commissioner without first giving the plaintiffs the opportunity of being heard.

*Archibald* (with *Selalad* and *Bhandarkar*) for the plaintiffs — Section 354 allows a notice to pull down only in cases of urgent and immediate danger. In other cases the notice issued under this section should be to secure or to repair. It is now six months since notices complained of were issued and the house is still standing and is occupied and used just as it always has been. This is conclusive proof that there was no urgent danger in January and February last and therefore there was no justification for the notices. The evidence given now at the hearing shows that the house though possibly needing some slight repair is quite sound and not dangerous or ruinous. The principles laid down in *Metropolitan Asylum District v. Hill* (1) are applicable here.

No doubt the Commissioner under section 354 may issue a notice if it appear to him that a building is dangerous. But there is nothing in the statute which takes away the right to question the propriety of his action by a suit. Section 471 recognizes that right for it speaks of any requisition lawfully made. How can the legality of a requisition be ascertained except by a suit? That point, however, has been decided by *Jardine, J.*, in *Hajee Essa Hajee Fudla v. Charles* (2) which was a case on the corresponding section of the previous Municipal Act.

It is of course, impossible for the Commissioner to have personal knowledge of all the matters arising in all the depart-

(1) (1887) 6 App. Cas. 103.

(2) Suit No 275 of 1887 (unreported) referred to in *Scott and Robertson v. the Bombay Municipal Act 1888* p. 170.

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ments of the Municipality. He must rely on his subordinates. In their zeal to improve the City by widening the street they have misled him. The documents in evidence show their designs on the plaintiffs' house for several years previous to the notice of the 6th January 1908. The Commissioner signed that notice on the reports laid before him. In so doing he acted judicially and both sides should have been heard. But plaintiffs had no opportunity of stating their case. *Cooper v Wandsworth District Board of Works* <sup>(1)</sup>, *Hopkins v Smethwick Local Board of Health* <sup>(2)</sup>, *Attorney General v Hooper* <sup>(3)</sup>. Judicial authority cannot be delegated to subordinates, see *Broom's Legal Maxims*, page 632, 7th edition.

*Jardine* (with *Weldon*) for the defendant.—Under section 354 of the City of Bombay Municipal Act the Commissioner's opinion is final and the notice issued by him in accordance with that opinion cannot be questioned in a suit unless bad faith can be shown. *Gangjibhai v Municipal Corporation of Bombay* <sup>(4)</sup>, *Cheetham v Mayor, &c, of Manchester* <sup>(5)</sup>. So also in cases arising under section 231 of the Act the Commissioner's opinion is conclusive. *Goverdhundas Gokuldas Tejpal v The Municipal Commissioner* <sup>(6)</sup>. Section 354 does not require that the person on whom notice is served shall be called on to show cause against it if he has any. Some sections of the Act do prescribe that procedure, e.g., 357 clause (1), sub clause (b), but no similar words appear in section 354. The omission must be intentional. See also *Maxwell on Statutes*, page 335, 7th edition.

The case of the Managers of the *Metropolitan Asylum District v. Hill* <sup>(7)</sup> only applies where the Act authorized by the statute can be done without injury to property. It is not applicable here for the acts authorized by sections 354 and 488 necessarily involve injury to property and loss to the owner of it.

We contend that the evidence shows that the condition of the house justified the issue of the notice. It was and is in a dangerous condition and ought to be pulled down.

(1) (1853) 14 C B N S 180

(2) (1890) 21 Q B D 710

(3) [1893] 3 Ch 423

(4) (1899) 1 Bom L R. 754

(5) (1876) L R 10 C P 440

(6) (1893) City and Patell's Small Cause Court cases p. 281

(7) (1891) 6 App Cas 193

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The following sections of the City of Bombay Municipal Act were referred to and commented upon —Sections 298, 336, 342, 438, 471, 489, 491 and 503.

MACLEOD, J. —The plaintiffs as trustees of Godiji Maharaj's temple in Bombay are the owners of a house at the corner of Chakla Street and Cumbharwada Cross Lane, consisting of a ground floor and one upper floor. The rooms on the ground floor are used for shops and the rooms on the upper floor are partly used for living purposes and partly for storing goods. The gross rental is Rs. 316.

On the 6th January 1908 the plaintiffs were served with a notice from the defendant, the Municipal Commissioner for the City of Bombay (Exhibit A), requiring them, under section 354 of the City of Bombay Municipal Act 1888, to pull down the whole of the first floor of the said house including the flooring and the roof and pull down or secure the remainder of the said structure, on the ground that the structure was in a ruinous condition, likely to fall and dangerous to any person occupying resorting to or passing by the same. The plaintiffs in consequence of this above notice instructed their Engineer Mr. N. D. Kanga to inspect the building and he expressed the opinion that no portion of the building was dangerous or in a ruinous condition or likely to fall. The plaintiffs through their solicitors Messrs. Bhaishankar and Kanga then wrote to the defendant on the 1st February a letter (Exhibit A 3) —

Our clients the Trustees of the Godiji temple in whom is vested the house No. 145 situate at Chakla Street have placed in our hands Notice No. 293 of 1907-08 dated the 6th ultimo, issued under section 354 of the City of Bombay Municipal Act, 1888, and we are instructed to state in reply that on receipt of your said notice our clients showed the same house to their engineer who after careful examination found that the said house was in quite a sound condition and was not in a ruinous condition or likely to fall down or dangerous to any person occupying, resorting to or passing by the same, and we believe that some mistake has been committed in issuing the said notice in regard to the said house.

We therefore request that you will be good enough to have the house examined by the Engineering Department of the Municipality with the view of ascertaining its real condition and our clients are satisfied that it will be found quite unnecessary to pull down the whole of the first floor

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including the flooring and the roof and in the meantime oblige our clients by suspending action on the said notice

Our clients' engineer will be glad to meet the officer of the Executive Engineer's Department who may be deputed to inspect the house and discuss the subject with him on any day which may be appointed for the purpose.

On the 17th February the defendant wrote to the plaintiffs' solicitors (Exhibit A5) forwarding the memo of the Executive Engineer. It was as follows —

The house in question has been examined by this department and certain portions of the same having been found in an unsafe condition, a notice under section 304 of the Municipal Act has been issued for the removal of the same

The solicitors may be informed that a month's time was given to comply with the notice which time has already expired and as their clients have done nothing in the subject, Municipality will now take further steps in the matter

On the 19th February 1908 notice was given to the plaintiffs under the signature of Mr A B Vaidya, Inspector of Streets and Buildings, B Ward South, that he would enter on the premises at 8.30 on the 27th February to pull down the first floor as required by the notice of the 6th January. This notice is Exhibit B. The history of the notice is as follows. Mr Katrak, Superintendent of Streets and Buildings, sent A 3 to Mr Vaidya with a memo A 17 asking him to report. Mr Vaidya returned it with his remarks A 4. He says "The building was examined by the Engineering Department and the notice was issued after careful inspection." No further inspection was made by Mr Vaidya before he reported. Mr Katrak on getting Exhibit A 4 prepared a draft (Exhibit A 18) for Mr Hall's, the Executive Engineer's approval. Mr Hall approved the draft on 11th February and on the 14th Mr Katrak gave instructions on his own responsibility to issue the notice B. It was drawn up and signed by Mr Vaidya before the defendant replied on the 17th February by Exhibit A 5 to plaintiffs' solicitors' letter A 3 though it was not served until the 19th February. The plaintiffs then asked Mr Chambers, the well known Architect and Surveyor, to inspect the building. He did so on the 24th February and made a report on the same day (Exhibit A 6), in which he expressed the opinion that the building was not



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dangerous or in a ruinous condition or likely to fall. The plaintiffs' solicitors then wrote to defendant on the 24th February (Exhibit A 7) forwarding a copy of Mr Chambers' report and asking defendant to reconsider the matter, otherwise they would be obliged to file a suit for an injunction. No answer being received this suit was filed on the 25th February. On the 15th April plaintiffs obtained an *interim* injunction restraining the defendant from pulling down or trespassing upon the premises in the *plaint mentions* until the 8th May, on their undertaking not to do any work to their building. Clearly there was no imminent danger then. On the 6th May the injunction was extended for a fortnight and was finally, on the 22nd May, after considerable argument, extended to the hearing of the suit. The defendant filed his written statement on the 9th April. He says that when Exhibit A was issued it appeared to him and it still appeared to him that the condition of the upper story of plaintiffs' house was such that the said structure was dangerous to persons occupying, resorting to or passing by it that the danger would be enhanced if the said structure were not removed before heavy rain fell, and under the above circumstances the plaintiffs were not entitled to the injunction prayed for. By an order of the 14th April 1908 the plaintiffs were allowed to amend their *plaint* by adding clauses 11a and 11b in which they alleged the defendant in issuing the said notice did not exercise his powers in a proper, reasonable or considerate manner and that his object was not a *bona fide* one, his real object being to acquire the property for widening Cumbharnada Cross Lane. The defendant replied to these allegations by an affidavit of the 5th May.

Before dealing with the circumstances under which the notice of the 6th January 1908 came to be issued I must refer to the previous history of the plaintiffs' house and the correspondence between the owners and the Municipality relied upon by the plaintiffs as showing the real object of the defendant in issuing the notice under section 304. The plaintiffs bought the house on the 6th October 1904. On the 8th October 1904 the previous owner had applied to the Executive Engineer of the Municipality to add a story (Exhibit C). On the 7th November 1904 the

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Executive Engineer disapproved by Exhibit D on the ground that the whole of the proposed work was within the regular line of the street as shown in the plan sent therewith. On the 17th November the owner's Engineer wrote Exhibit E asking that his client should either be allowed to build or the property should be acquired by the Municipality. On the 25th March 1902 the Executive Engineer declined to entertain the proposal (Exhibit G). There was also a further objection that the building was not strong enough to bear another story. In 1905 the plaintiffs executed certain repairs within the regular line of the street without Municipal approval, and were fined Rs 5 by the Police Court. Thereafter a notice was served on them (Exhibit H) of the 22nd July to remove the alterations. Proceedings to enforce the notice however, were not taken as according to a minute appearing on Exhibit J the work done had been very trifling. On the 13th July 1905 the Divisional Health Officer issued a notice (Exhibit K) requiring plaintiffs to provide a privy of two seats and as plaintiffs did not comply with the requisition a summons was taken out on the 7th December (Exhibit L). On the 3rd February 1906 plaintiffs' Engineer wrote to the Health Officer (Exhibit N) stating that they had submitted plans for the privies to the Executive Engineer and asking for the summons to be withdrawn. The same day the plaintiffs submitted plans to the Executive Engineer (Exhibit O). On the 24th February 1906 the Executive Engineer wrote Exhibit Q to the Municipal Commissioner stating that as the works intended to be constructed according to the said plan were within the regular line of the street he proposed to require the building to be set back. On the same day the Executive Engineer sent a notice of disapproval (Exhibit R) to the plaintiffs. On the 19th March 1906 the Divisional Health Officer wrote Exhibit S to the Executive Engineer in respect of the summons taken out against the plaintiffs for not building the privies. By the memorandum of the 29th March (Exhibit P) prepared by Mr Vaidya for the Executive Engineer the Divisional Health Officer was to be informed that the plaintiffs' plans for the privies could not be approved, as the whole property was intended to be required for the improvements of the road and

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the question of compensation was under consideration. On the 24th March the Executive Engineer reported to the Commissioner (Exhibit V) advising that the whole property should be acquired and the Commissioner's sanction was solicited. On the 29th March the Divisional Health Officer was informed that the question of set back was under consideration. The question of obtaining the set back seems to have remained in abeyance in the Commissioner's office in spite of reminders from the Executive Engineer. That Officer wrote again on the 14th November 1906 (Exhibit Z) asking for the Commissioner's early instructions. On the 29th November the Commissioner wrote Exhibit A1, in reply to Z, saying that the acquisition of the set back may be allowed to stand over until the owner of the property gives the Municipality an opportunity of taking it, and in the meantime the Health Department were to take no further action in the matter of privy accommodation. While this correspondence was going on there was no suggestion whatever that plaintiffs' house was in a dangerous condition. On the 29th November 1907 Mr. Vaidya, Inspector, and Mr. Katrak, Superintendent of Streets and Buildings for this ward, were on a round of inspection. To the north of plaintiffs' house one Harichand Kapurchand was erecting a building with a ground floor and three upper floors, and the erection of this building had to be supervised by the Municipal officers. Mr. Vaidya said that he and Mr. Katrak were passing down Coombharwada Cross Lane when he drew Mr. Katrak's attention to the way in which plaintiffs' house leaned over towards the north. Thereupon they both went into plaintiffs' house and after inspecting it Mr. Katrak gave the witness instructions to examine the house more in detail and report to him. Mr. Katrak said that he and the Inspector while looking out from Harichand's house noticed the lean over of plaintiffs' house, but it is not very material from where the lean over was first noticed, though I do not think that Mr. Katrak could have seen anything more than the roof of plaintiffs' house from Harichand's window. Mr. Vaidya examined the plaintiffs' house on the 6th and 9th December making rough notes of the result of his inspections (Exhibit 5). He reported to Mr. Katrak and they both visited the house on the 11th December.

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Mr Vaidya brought his rough notes and a form of report marked A2 in which he had filled in the Inspector's remark column with a summary of his rough notes Mr Katrak then filled in the Superintendent's remark column in pencil and also the directions on the second sheet for the Notice Clerk The two sheets were then returned to Mr Vaidya to get the notice drawn up The report and the notice were afterwards sent by Mr Vaidya to Mr Katrak who initialled the notice and forwarded the papers to Mr Hall, the Executive Engineer Mr Hall signed the notice and sent it alone to the defendant Defendant signed the notice and a duplicate copy was served on the plaintiffs on the 6th January Before that they had no notice that their house was being inspected by the Municipal Officers It is not suggested that either the defendant or Mr Hall had seen the house or formed any opinion of their own regarding its condition before the suit was filed Defendant signed the notice because he relied on Mr Hall's signature and Mr Hall signed it because he relied on Mr Katrak's initials

The third issue deals with the defendant's contention that this notice is conclusive unless the plaintiffs can prove *mala fides* It is not suggested by the plaintiffs that there is any *mala fides* on the part of the defendant personally but they contended in their plaint as originally framed that they were entitled to show that the condition of their house was not such as to warrant the issue of the notice, and that if they succeeded in doing that they were entitled to the injunction, as it could not possibly have appeared to the defendant that the house was in a dangerous condition or likely to fall It could well be implied from this that plaintiffs had raised the question whether the defendant had exercised the powers vested in him under the said section in a proper, reasonable and considerate manner or whether he had acted capriciously or arbitrarily After inspection of the defendant's documents it seemed probable to the plaintiffs that the notice was issued owing to a desire on the part of the defendant to acquire their property for the purpose of widening Coombharwada Cross Lane They therefore applied for and obtained leave to amend their plaint by adding two clauses definitely raising these questions

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(1) Whether the defendant had exercised his powers in a proper, reasonable and considerate manner and not capriciously or arbitrarily?

(2) Whether the defendant had been actuated by an improper motive?

Section 354 of the Municipal Act of 1888 is the only section under which the Commissioner can act in respect of buildings in a ruinous and dangerous condition. It is headed—“*Dangerous structures*”

Sub-section (1) is as follows —

If it shall at any time appear to the Commissioner that any structure (including under this expression any building, wall or other structure and anything affixed to or projecting from any building wall or other structure) is in a ruinous condition or likely to fall, or in any way dangerous to any person occupying resorting to or passing by such structure or any other structure or place in the neighbourhood thereof, the Commissioner may, by written notice require the owner or occupier of such structure, to pull down, secure or repair such structure and to prevent all cause of danger therefrom

The primary object of the section is the safety of the public, to secure which the Commissioner must of necessity be given very wide powers. But it does not follow that those powers can be exercised arbitrarily and without due consideration to the provisions of the section and the rights of individuals

In the first place it must appear to the Commissioner that a structure is in a ruinous condition or likely to fall or in any way dangerous to any person occupying, resorting to, or passing by such structure. Then the Commissioner may by written notice require the owner or occupier to pull down, secure or repair. It is admitted that the word ‘appear’ need not involve ‘appear to the eye’. It is sufficient if it appears to the Commissioner on the representations of a competent officer whose duty it is to make such representations. But the Commissioner’s action when ‘it appears’ is judicial, so that he must exercise his discretion in determining what action should be taken. In this case the Commissioner merely signed the notice which was sent to him by the Executive Engineer because it had previously been signed by that officer. The Commissioner on the strength of that signature concluded that a proper decision had been arrived at as regards the house. From 400 to 500 of these notices are issued

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every year and it is obviously impossible for the Commissioner to do more than trust to the discretion of his subordinates, but it is only by aid of a fiction that it can be said a notice signed in this way by the Commissioner complies with the section. It should be considered as a notice to show cause. It is not invalid, at the same time it cannot deprive the person served with it of his right to object unless the legislature has clearly deprived him of such a right. The Executive Engineer signed the notice because it was initialed by Mr Katrak. It is not contended that Mr Hall ever considered whether the requisition in the notice was the proper one under the circumstances. Neither the defendant nor Mr Hall had seen the premises before the suit was filed. It is further admitted that Mr Katrak was alone responsible for the framing of the notice and that he never considered whether the injury apprehended from the dangerous condition of the structure might not be prevented by securing or repairing the structure instead of pulling it down. There may of course be cases in which the danger is so imminent that the only obvious requisition to make on the owner is to pull down, in others the danger may be averted by less stringent measures.

Now danger means peril risk, hazard, exposure to injury from pain or other evil and can vary in degree according as the apprehended injury is expected to occur at once or at some future time. Section 35<sup>1</sup> applying to all degrees of danger and prescribing various precautionary measures to be taken to prevent injury resulting therefrom, it follows that first the degree of danger must be ascertained and then the appropriate precautionary measure prescribed. It is not suggested in this case that the danger was imminent, up to the end of the hearing no hoarding has been put up round the building, nor have the tenants been warned to vacate, and therefore a duty was imposed on the defendant to decide judicially what should be done to assure the safety of the public, having due regard to the interests of the owner. The time for exercising his discretion personally arrived when the plaintiffs complained against the notice. It was certainly very unfortunate that no attempt was made to meet the very reasonable request made in the last two paragraphs of plaintiffs' letter of the 1st February 1908 (Exhibit A3). The letter



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came down to Mr Vaidya for report. He did not go to examine the house again, the only question he considered was whether the notice was issued against the plaintiffs' house by mistake instead of against some other house, and he reported there was no mistake. That may have been all that was necessary for Mr Vaidya to do, but nothing can excuse the neglect of the defendant to deal with plaintiffs' request for an opportunity to be heard on the question whether the notice to pull down was necessary. I do not imagine the defendant was personally to blame for this as from the endorsement on A3 it appears to have been dealt with by his assistant, the fault lay with the Executive Engineers Department. Legally, however, it affects the discretion of the defendant.

Discretion must not be arbitrary. "The very term itself standing and unsupported by circumstances imports the exercise of judgment wisdom and skill as contradistinguished from unthinking folly, heady violence or rash injustice." See *Paskall v Passmore* (1). Mr Justice relied on the remarks of Jenkins, O J, in *Gangabhai v The Municipal Corporation of Bombay* (2). "The Legislature has in the view I take of the Act vested in the Municipal Commissioner a discretion in this matter and the Court would not interfere in his exercise merely because the object in view might be carried out in some other way nor would it lightly impute to him bad faith." I entirely agree, but in the first instance the Court is entitled to inquire whether the discretion has been exercised. This brings me to the question raised by Mr Kirkpatrick whether the Commissioner having to exercise his discretion can do so through an agent. Discretion has to be exercised, first in coming to a conclusion as to the state of the structure and then in fixing upon the appropriate remedy. It is obviously impossible for the Commissioner to inspect all structures that are suspected of being dangerous. Therefore in my opinion it is a sufficient exercise of his discretion in deciding what structures are dangerous if he appoints a competent person to represent to him what structures are dangerous. But if a notice is issued based on the representation of such a person it is open to the

(1) 15 Pa. St. D. 301

(2) (1893) 1 Bom. L. R. 751 at p. 761

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owner to prove that that person has not exercised his discretion or has been actuated by improper motives in prescribing the steps to be taken. Otherwise the owner has no remedy. The Commissioner has only to say "I have appointed a competent person to report to me, that person reported the structure was dangerous and must be pulled down. I issued a notice accordingly and you cannot dispute it."

If the owner can prove to the satisfaction of the Court that his house was not in such a dangerous condition as to warrant an order to pull down, that would be *prima facie* evidence that the person appointed by the Commissioner had not exercised his discretion. When the Commissioner has perforce to act on advice of his expert advisers it must be proved that they decided judicially what advice they should offer. If they did not, the provisions of the section have not been complied with. In other words, the Commissioner can exercise his discretion through an agent, but it follows that if the agent has not exercised his discretion nor has the Commissioner, the Commissioner has the opportunity to remedy this when the owner complains.

The case of *Cheetham v Mayor, &c, of Manchester*<sup>(1)</sup> does not assist the defendant. In that case the defendant acted in alleged execution of powers given them by an Act of Parliament 30 Vic c 36. Under section 38 of that Act if the City Surveyor certified in writing that there was imminent danger from any building the Corporation was bound without notice to cause the same to be taken down or repaired or secured. The City Surveyor certified that there was imminent danger from plaintiff's building. The Corporation directed the surveyor to pull down secure or repair the building as he should think fit. The Surveyor then informed the plaintiff of the directions given to him and proposed that the plaintiff should pull down his front wall. The plaintiff refused. The Surveyor then did the work himself. It was held that the certificate of the Surveyor was conclusive. Keating J, says —

The provision in s 38 is no doubt, a very stringent one, vesting in the surveyor as it does absolute power to say that a man's house shall be

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pulled down. The legislature, however, appears to have thought it necessary to confer upon him the power, and it is our business to see that their intention is carried out."

It will be seen that section 33 of 30 Vict. c. 36 only dealt with cases of imminent danger. Sections 58 and 59 of the Manchester Police Act of 1844 prescribed the measures to be taken by the Council of the Borough in the case of ruinous and dangerous houses. Such premises had to be regularly and lawfully proceeded against by presentment of the grand jury at the Sessions. On presentment the Council could have the premises surveyed and a notice served on the owner. The powers given by the Legislature in section 33 of 30 Vict. c. 36 being of a totally different nature to the powers given by section 354 of the Municipal Act, the decision in the case referred to cannot be considered as an authority in this case.

On the other hand, Mr. Kirkpatrick relied on *Cooper v The Wandsworth Board of Works*<sup>(1)</sup>. The 76th section of the Metropolitan Local Management Act, 18 & 19 Vict. c. 120, empowered the District Board to alter or demolish a house where a builder had neglected to give notice of his intention to build. Plaintiff began to build without giving notice. The defendants then entered and pulled down the building. It was held the defendants were bound to give the plaintiff an opportunity of being heard before demolishing the building. Willes, J., says (at p. 190):—

"I apprehend that a tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds and that that rule is of universal application, and founded upon the plainest principles of justice."

Byles, J., says (at p. 194):—

"It seems to me that the Board are wrong, whether they acted judicially or ministerially. I conceive they acted judicially, because they had to determine the offence, and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions, beginning with *Dr Bentley's case*<sup>(2)</sup> and ending with some very recent cases, establish, that, although there are no positive words in a statute requiring that the party should be heard, yet the justice of the common law will supply the omission of the legislature."

(1) (183) 11 C. B. N. S. 180

(2) *The King v. The Case of the, &c. of Cambridge*, 1 Str. 567.

Though the facts were different the above principles seem to be of present application. No doubt under certain circumstances the safety of the public must be considered in priority to the right of private individuals, as in the case of imminent danger, but in the case before me where there is no suggestion of imminent danger, the plaintiffs were entitled to be heard as a matter of common justice.

In *Vestry of St James and St. John Clerkenwell v. Feary*<sup>(1)</sup> Lord Coleridge, C J, agreed that *Cooper v. Wandsworth Board of Works*<sup>(2)</sup> was an authority for the proposition that an opportunity should be given of questioning the propriety of the order made by the vestry.

The case of *Hajee Essa Hajee Fudla v Charles*<sup>(3)</sup> was a suit filed in this Court against the Municipal Commissioner of Bombay for acting under the powers vested in him by section 200 of the Bombay Municipal Act, 1872. That section, which corresponded with section 354 of the present Act, enacted—

“If any house be deemed by the Commissioner to be dangerous he shall immediately, if it appears to him necessary cause a fence to be put up and cause notice to be given to pull down, secure or repair etc

The Court came to the conclusion that the plaintiffs' house was in a dangerous condition but it was argued the notice was bad since the Commissioner should have exercised judgment of his own instead of relying on a report of a subordinate. Jardine J, in an unreported judgment held that the Municipal Act did not deprive any person injured by an improper exercise of authority under section 200 of the ordinary remedy by suit. The Commissioner had to appear and plead his authority and it might be had to justify his act. The Commissioner should examine the circumstances of the particular case in order to see whether the defence was made out. The Commissioner was entitled to act under section 200 on the report of an Inspector of Buildings and did not act indiscreetly in relying on the Inspector's statement about plaintiffs building, *although it was easy to imagine cases of great or completely when an officer entrusted with those great powers*

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(1) (1890) 21 Q B D 703 at p 709

(2) O O J Ser t No. 225 of 1887

(3) (1863) 11 C B N S 183

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*would, if he used proper discretion, take other and more experienced advice, or make further inquiry or hear the owner of the property more fully, unless the emergency admitted of no delay whatever*

The remarks of the learned Judge which I have italicized above can well be applied to this case. In the first place the words 'hear the owner more fully' imply that the owner had a right to be heard in any case. Even then the owner should have in cases of greater complexity a further opportunity of being heard, and a failure by the Commissioner to hear him would be a failure to exercise proper discretion.

There was no doubt, however, in that case that the Inspector's report was correct, the plaintiff had had a previous notice to pull down ten months before he had been heard, the Municipal authorities had been willing to allow him to adopt preventative measures, and it was only when those had failed that a second notice was served.

Mr Kirkpatrick further relied on section 471 of the Municipal Act 1888 which provides for the penalties to be executed against anyone who fails to comply with any requisition lawfully made under the sections therein referred to, as showing that a person on whom such a requisition is made is entitled to prove that requisition was not made lawfully, *i. e.*, in accordance with the conditions prescribed by the legislature and that therefore the notice could not be conclusive. Mr. Jardine, on the other hand, wished to confine the word 'lawfully' to procedure in drawing up and issuing the notice. Nothing regarding procedure appears in section 354 and the notice to enter under section 488 stands on a different footing. I think that Mr Kirkpatrick's argument is correct, and that a person proceeded against under section 471 would be entitled to show that the provisions of the Act had not been complied with, otherwise the word 'lawfully' is without meaning and unnecessary. I do not think anything that I have said is calculated to hamper the action of the Commissioner under section 354. The legislature has not given him absolute powers, and whether the danger is imminent or not it is impossible to dispute the justice of allowing an owner to be

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heard on the question as to what steps should be taken to secure the safety of the public. In cases where the danger is certified as imminent, there would be little chance of his getting an injunction, but in a case like the present if he can get an injunction he may succeed in saving his property otherwise he can only assert his claim to damages.

The actual condition of the plaintiffs' house at the date of the notice is then a question of fact which must be decided. In dealing with this it is necessary to distinguish between the evidence of examination made before and after suit filed, namely, the 20th February. After the 11th December 1907 an uno examined it on behalf of the defendant till the 27th February. Between the 6th January and 25th February Mr Kanga and Mr Chambers examined it on plaintiffs' behalf. It is admitted that the whole of the upper floor leans over from the south to north. Nearly all the posts have been plumbed by both parties and the results obtained by the plaintiffs and defendants' Engineers respectively appear in Exhibit A13 in parallel columns. I have no hesitation in placing more reliance on the results obtained by Messrs Chambers Stevens and Kanga for the plaintiffs. There have been too many indications throughout the case of the inclination of Mr Vaidya and Mr Katrak to exaggerate, to enable me to place implicit reliance on their calculations. In plumbing, nothing can be easier than to miscalculate half an inch or so, and it is certain that most of the wood in the building was put in undressed so that accurate plumbing would be in some cases impossible. Mr Chambers refers to some of these in Exhibit A13. Mr Vaidya and Mr Katrak have not allowed for this. Then it appeared that the plan to be annexed to Mr Hall's affidavit of the 16th March (Exhibit 9) was prepared by Mr Vaidya and passed by Mr Katrak. Defendant strenuously opposed the granting of the *interim* injunction and Mr Vaidya knew the plan was wanted to support the defendant's case in Court. It is always difficult to come to a satisfactory conclusion on questions of fact when all the evidence is on affidavits, but a drawing carries far more conviction than pages of affidavit and the section appearing on the plan must have been intended to give the Court a correct idea of the dangerous

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condition of the building. The ground plan by itself could not give that idea. If the injunction had not been granted, the house would have been pulled down and the relief sought by the suit would have become unobtainable. The plaintiffs' case thus hanging in the balance, the Executive Engineer, whose opinion would necessarily carry very great weight with the Court, advising the pulling down of the first floor, there is shown to the Court a section of the building which can only be described as most misleading. Yet in Exhibit 6 dated the 6th March Mr Vaidya affirms that the plan was correct and the figures therein showing the extent of the lean over were correct. In Exhibit 2 of the same date Mr Katrak swears he has satisfied himself of the correctness of the plan. Mr. Hall also says in his affidavit on the 16th March he believes the plan to be correct. Whether or not it was intentionally prepared in order to mislead the Court, there was certainly culpable negligence. No reasonable man comparing the correct and false sections could possibly come to any other conclusion. Nor is it clear why the plan was annexed to Mr Hall's affidavit instead of to the affidavit of Mr Vaidya who prepared it, unless it was considered that it would thereby carry more weight. The verandah post is said to be  $4\frac{1}{2}$ " out of plumb  $1\frac{1}{2}$ " more than any other post on that line and 2' more than the posts to the east and west of it. Mr Chambers plumbed it 3" out and remarked in A 13 — "This post is roughly squared out of a bent piece of timber of the shape in which it grew and therefore it is almost impossible to plumb it accurately." This is confirmed by reference to two of the photographs annexed to Exhibit 3. The post is clearly visible, and appears to incline outwards more from the top of the railing than from the floor level. The scale of the section is very small, 8' to an inch, and the lean over is much exaggerated. How much it is difficult to say, but Mr Chambers and Mr Stevens in Exhibit A 12, para 4, say that the posts said to be leaning about 3" towards the north are plotted as if they were 6" towards that side. The answer to this in Exhibit 3, para 4 is somewhat ingenuous though practically admitting the exaggeration —

In answer to para 4 of the joint affidavit of Messrs. Chambers and Stevens we refer to the plan itself (plan A) which in every case clearly

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shows in figures the actual extent of 'lean over' of the posts and wall when plumb-d, and the section shows the height in which such 'lean over' occurs so that even if the slope is not plotted with strict accuracy no one who understands a plan can possibly be misled by plan A as to facts.

The centre post on the ground floor is omitted and also the post on the first floor between the south wall and the centre post. Apart from omissions and exaggeration it is not a fair average section. The attempts made by Mr. Vaidya and Mr. Katrak in their affidavit of the 5th May (Exhibit 3) to justify that section only aggravated the offence, especially as correct sections appeared in the plan annexed to the same affidavit. It was suggested the post on the ground floor was omitted because it was only necessary to show the condition of the upper floor but the plaintiffs were required to remove the joists which, it was alleged, had sagged and those would rest on the beams. Obviously these beams would afford more support to the joists if there were centre posts on the ground floor. They say the post is left out on the upper floor because it had not been plumb-d—a very insufficient reason. Again, the plan showed one post, Gf, leaning over 10". I am satisfied that though there was a slight lean over to the north the lean over of 10" was in the same direction as the ridge of the roof in order to meet a joint in the ridge which did not correspond with the posts in the partition. Afterwards it was discovered that this post was fixed in the ground and came through the floor. Mr. Hall then admitted it was a source of strength and not a sign of danger. Lastly, the allegation that in one room there was a separation between the south wall and the floor proved to be absolutely without foundation.

I have dealt with the matter at considerable length, first, because on the strength of those affidavits of the 16th March the Court was asked to decline to take the responsibility of ordering the building to remain standing, and thereby in effect to dismiss the suit, and secondly, because to swear a plan as correct which as a matter of fact is incorrect in a very material way seems perilously near to giving false evidence. In any event it must have a bearing on the evidence of Mr. Vaidya and Mr. Katrak given in Court, and the attitude adopted by the Executive



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Engineer's Department throughout the case. But all discussion regarding the lean over, whether it was original or began subsequent to the completion of the building, or was caused by the thrust of the roof, and whether it was due to the lean over that the building should be considered, is a dangerous condition, became unnecessary when Mr Hall admitted that the building as it existed might continue to exist for years in spite of the lean over if the timbers were sound. The main question therefore is whether the timber was reasonably sound, that is to say so sound that there could be no danger of its being likely to give way and so carry the whole of the upper floor with it. On the 29th November 1907 when Mr Katrak first visited the building he came to no conclusion about its condition; he only instructed Mr Vaidya to examine it. It is certainly remarkable that Mr Katrak had entirely forgotten this visit until reminded of it by Mr Vaidya after his examination by Mr Jardine had been closed. In para 2 of his affidavit (Exhibit 2) Mr Katrak says nothing about this visit and in para 2 of his affidavit (Exhibit 6) Mr Vaidya says he has read para 2 of Mr Katrak's affidavit and it was correct. Mr Vaidya visited the house on the 6th and 9th December owing to Mr Katrak's instructions and made very full notes of his inspection (Exhibit 5) and yet nothing is said in the affidavit about these visits nor were those notes disclosed. Mr Vaidya said his remarks on A 2 were a summary of his notes. As regards the condition of the timber he says in those notes (Exhibit 5)—'ground floor—rotten joists are marked on spot as also the portion of beams. First floor—the rotten rafters are marked on spot and are unsound.' This is summarized in A2 as follows—"The joists of flooring are rotten in places as also the rafters."

No doubt in Exhibit 5 there is a rough ground plan with some posts marked as decayed, but nothing is said about them in the remarks, so their condition could not have been considered as affecting the stability of the structure.

Mr. Katrak's remarks are as follows—"Many rafters are rotten. The joists of flooring of the room of the first floor

have sagged". In the evidence before me, there is nothing to show the joists are rotten. Mr. Katrak said he noticed decay in a few places, but nothing sufficient to cause a remark to be recorded, so he only said they had sagged. The notice to pull down was issued therefore because the walls had become out of plumb, many rafters were rotten and the joists had sagged. I may remark here it is difficult to imagine how Mr. Katrak came to record in A2 the south wall was 3 or 4 inches out of plumb in 4 feet height when the wall was 5' 6" high.

It has not been suggested that Mr. Katrak ever considered whether the building could not be repaired. For the above reasons he practically condemned the whole structure, as the ground floor was useless without the joists and flooring and nothing could be done in the way of reconstruction without the leave of the defendant. It is clear that this need not have been given and that defendant might have acquired the whole property under section 295. If therefore plaintiff had complied with the notice they would have lost the whole of their building and would only have been paid the value of the land. The rents they were getting from the building were extremely profitable and there would be a great difference between the value of the property as a rent bearing concern and the value of the land vacant as estimated by Mr. Hall in his memo to the Commissioner. Before the suit was filed Mr. Chambers, Mr. Stevens and Mr. Kanga examined the building. They reported generally that the building in their opinion was in a sound condition. It must be remembered that they had before them only the notice of the 6th January and they could not know for what particular reasons the notice had been issued. With regard to the evidence given of examinations made of the building in general and the timber in particular after suit filed it is necessary to remember that this has only an indirect bearing on the question whether the notice of the 6th January was properly issued. Such evidence of defects proved to exist at the date of the notice is only relevant in far as it proves that the grounds for which Mr. Katrak condemned the building were correct, evidence of defects discovered since the suit was filed and not

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patent to Mr Katrak when he is used the notice is irrelevant to the question whether Mr Katrak exercised a proper discretion. On the 16th March 1907 Mr. Hall, Mr Katrak and Mr Vaidya made affidavits (Exhibits 9, 2 and 6) for the purpose of opposing the plaintiffs' application for injunction which I have already referred to. Mr. Hall says in para 1 of his affidavit "Much of the wood work of the said building is in a very decayed condition" Mr Katrak says in para 2 of his affidavit "Many rafters and some of the posts and post plates were rotten" Mr Vaidya in his affidavit merely says para 2 of Mr. Katrak's affidavit is correct. On the 1st May Mr Chambers and Mr Stevens reply to these affidavits. They point out the misleading nature of the section in defendant's plan and refer to a correct section on their plan annexed. In para 8 they say—"there is nothing to show that the posts supporting the roof are leaning over to a considerable extent or that the south wall leans over considerably towards the north or that the wood work of the said building is in a decayed condition" Then in para 11 they give a general opinion that the building is sound and not in a dangerous condition. This affidavit embodies practically the whole of Exhibit A 9 which is a report made by the plaintiffs three Engineers on the 4th April. In para 10 they say: "The wood work on the whole is sound and some of it is quite new. Messrs Katrak and Vaidya reply to this in their affidavit of the 5th May (Exhibit 3). In para 3 they say regarding the posts, post plates and purlins, 'we examined them carefully on the 15th April and found two of the post plates and two of the purlins in the gallery on the north, two of the post plates on the south wall and six of the purlins on the row of posts the subject of sub clause (d) to be in a decayed condition' In para 8 (3) they say—"Finally we say as regards the wood work seven of the posts are decayed, twelve of the purlins and post plates are decayed and upwards of eighty of the rafters are decayed" Four photos of the building taken from various positions are annexed to the affidavit.

Mr Hall in his affidavit of the 5th May (Exhibit 10) says in para 2 that the danger due to the absence of ties between

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the posts in the south wall and those in the gallery to the north was very greatly aggravated by the fact that some of the posts on which the roof rested and many of the post plates were in a decayed condition. At the hearing Mr Chambers said in cross-examination — I found no decayed wood anywhere. I tried to find if there was any decayed timber as I was told the timber was rotten. If the posts and post plates were decayed that would be a source of danger green timber has been put in, the bark has gone but the heart is sound. That was what I referred to when I said the timber was on the whole sound." On the 18th March Mr. Stevens was examined. He had visited the house the previous day and had found the post plate in the south west room had been considerably eaten by white ants. But he thought that did not affect the stability of the building. The centre of the post plate was sound. In cross examination he admitted that he had noticed that post plate was ant eaten on the 25th February but did not refer to it until he came into the witness box because the defendant had made no remarks about this post plate at any time during the proceedings. Further on he said—"I found no decay anywhere except in the post plate eaten by white ants and in one rafter".

Mr Kanga was not questioned in detail about the condition of the wood. Though Mr. Katrak was examined at considerable length about the condition of the wood work in order to reply to the evidence of plaintiffs' witness, I need only refer to the evidence of Mr Hall who visited the premises on the 19th June with defendants Solicitor, Mr Crawford, with the express purpose of taking careful notes of the condition of the woodwork. These notes are Exhibit 11, and Exhibit 12 is a plan showing the timber referred to there. It is clear that the 7 posts and 12 purlins and post plates referred to in para 3 of the affidavit of Messrs Katrak and Vaidya (Exhibit 3) as decayed do not all appear in Exhibit 12. Only two posts Bc and Fe are marked as unsound and 8 post plates.

It would have been better if the Court had first been consulted so that directions might have been given regarding the desirability of the plaintiffs having notice of Mr. Hall's visit

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As a matter of fact they had no notice and it was therefore necessary for Mr. Chambers to inspect the building again and to give evidence in rebuttal. The notes made by Mr. Chambers appear parallel with Mr. Hall's notes in Exhibit A22. Mr. Chambers admitted he found defects on the last visit which he had not noticed on previous visits. One rafter in the verandah 5th from the east end he found absolutely rotten and had it cut away. Part of three rafters condemned by Mr. Hall had been cut off and brought into Court. These were marked A23, A24 and A25. From these Exhibits it was easy to determine where Mr. Hall and Mr. Chambers were at issue. All wood which showed signs of decay or of having been eaten by weevils or white ants was condemned by Mr. Hall as decayed or rotten without reference to the extent of the decay or the work required to be done by each particular piece condemned. Mr. Chambers admitted in most cases that the pieces referred to in Exhibit 11 were decayed to a certain extent, but in most cases he considers there is sufficient strength left in the wood to do what is required and in the case of the worst rafters, if they went the roof would still exist without them. In considering what work was required of the rafters it must be remembered that they are from 7" to 8" centio with a bearing of about 4' only. Exhibits A23 and A25 apparently had been a little eaten away on the surface by weevils, but apart from that I am satisfied they were perfectly sound. A21 was considerably decayed but still quite capable of bearing all the work that was required of it. I think therefore there was no danger to be apprehended from the condition of the rafters. As regards Ic and Ic the only two posts which Mr. Hall condemned, Mr. Chambers and Mr. Stevens said that Ic was tested by a chisel and was not decayed, the outer skin of Ic, had gone, otherwise that post was sound. If all the posts were sound, there could not be any danger of a general collapse. Mr. Chambers admitted two post plates should be replaced, namely C D on line A and the one in the S. W. corner. A new post plate would cost Rs. 8. Mr. Stevens said he would only replace the S. W. post plate. The objections to the other six post plates condemned by Mr. Hall were I think hypercritical.

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It was also stated by defendant's witnesses that the joints of the post plates at post Gb had shifted and the joint at post Ha had opened showing that a movement was going on. Mr Chambers in Exhibit A22 explains that what was considered by Mr. Hall to be a shifting and opening was due to the post plates being of unequal width. He did not think the joints had moved and I think his opinion must be accepted as correct.

The building is undoubtedly an old one and it could not be expected that the woodwork had not suffered from various causes. The question is had it suffered to such extent as to cause the first floor to be in such a dangerous condition when the notice was served so that plaintiffs should be compelled to pull it down. No doubt I must take into consideration that Mr. Chambers and Mr Stevens would naturally be biased in favour of the plaintiffs, but if they thought the building was in a dangerous condition (and from their experience they must be able to form a very reliable opinion on its condition) I am quite sure no bias would hold them from saying so. On the other hand, Messrs Katrak and Vaidya depended mainly on the lean over when they reported the building was in a dangerous condition, and since the defendant decided to contest the suit, that report had to be supported. Evidence of every possible defect that the minutest examination could bring to light has been brought before the Court to show that the opinion formed by Mr Katrak was correct, but I remain quite unconvinced on the evidence that on the 6th January 1908 the plaintiffs' building was in a ruinous and dangerous condition and likely to fall. Further, I fail to understand how Mr Katrak with his experience came to the conclusion that the house was a fit subject for a notice under section 354. However, he did come to that conclusion but I am quite satisfied that he never exercised a proper discretion in considering what form the notice should take. Fifty to hundred rupees would have covered the cost of replacing all the woodwork condemned by Mr Hall and there was no reason whatever for issuing a notice which if executed would have caused a loss to the plaintiffs of several thousands of rupees. That can only be characterized as rank injustice. But besides contending that

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Mr Katrak did not exercise a proper discretion, the plaintiffs have suggested that he and therefore the defendant was actuated by improper motives. Neither Mr. Sheppard nor Mr. Hall had in their minds when they signed the notice the particular structure to which it referred, but as they have adopted the decision of Mr Katrak, the notice must stand or fall by the conduct of Mr Katrak. It is difficult to imagine that Mr. Katrak was not perfectly well aware that plaintiffs' house was nearly all within the regular line of the street, and it is not an unreasonable inference for the plaintiffs to suggest that Mr. Katrak thought he had found a good opportunity for getting rid of a building which stood in the way of a desirable street improvement. The fact that the plaintiffs' request for a further examination in the presence of their Engineers was ignored lends further strength to their suggestion. Reading Exhibit A3 it should have occurred to Mr. Katrak that the request was a reasonable one and he ought to have advised the Executive Engineer to pay some attention to it. Mr. Sheppard said in cross examination the plaintiffs had an opportunity of showing him there was no cause for the notice, but he had to admit in answer to the Court that his reply (Exhibit A5) gave no such opportunity to the plaintiffs.

Further, it was suggested by the plaintiffs that the projecting beams of Harichand's house were intended to support a verandah which could only be added when plaintiffs' house had been removed and that Messrs. Vaidya and Katrak were acting in collusion with Harichand in order to enable him to build his verandah. A very reasonable explanation of the projections was forthcoming, namely, that the scaffolding had to start from the plinth of the building owing to the narrowness of the street and it was necessary to have projections to which the scaffolding could be attached. The plan showing the projection of beams at the terrace to the east where no verandah could have been required supports this explanation. On the other hand, no doubt some of the projections could have been used to support a verandah and it was a curious coincidence that they should have only recently been cut away, but all this remains conjecture and nothing more. It would require very

strong evidence to satisfy me that the defendant had in his mind several months before the notice was served on the plaintiff's property, and that Mr. Karakh had permitted Harichand to project the beam over the purpose of a verandah. There are no other facts in the case which strongly support the plaintiff's case *mala fides*. At the same time the facts from the inference of *mala fides* is sought to be drawn is not irresistible as to admit of no other conclusion. I cannot find the charge of *mala fides* proved.

A very heavy responsibility is laid upon the Court in a case of this nature but I am thankful to say that the grant of the *interim* injunction has been justified by the facts.

There will be a decree for the plaintiffs restraining the defendant from pulling down or attempting to pull down or throwing upon the premises referred to in the plaint or in any other building action under the notices of the 6th January 1904 or 1st February 1904.

The defendant must pay the plaintiffs' costs. The plaintiffs are to be entitled to have the costs of one Engineer taxed as between attorney and client, the other Engineers will be entitled to a fee for preparing themselves for giving evidence and the usual charges.

Attorneys for the plaintiffs *Messrs Bhaskhar, Kanga and Girdharlal*.

Attorneys for the defendant *Messrs Crawford, Brown & Co*.

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## ORIGINAL CIVIL.

*Before Mr Justice Chandavarkar and Mr Justice Bhat for*

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KEDARMAL BHARAMAL APPELLANT AND PLAINTIFF, v SUPAJMAL  
GOVINDRAM, RESPONDENT AND DEFENDANT \*

September 11

*Pakki Adat agency—Place of performance of contract by Pakki Adatya—  
Custom—Jurisdiction*

K, a Bombay merchant employed S as his agent at Akola on the *pakki adat* system. On K's instructions S entered as his agent into certain contracts at Akola. On an agency account being taken a sum of money was found to be due from S to K. On K suing for this sum S pleaded that the High Court at Bombay had no jurisdiction to hear the suit on the ground that no part of the cause of action had arisen in Bombay.

*Held*, in the case of *Pakki Adat* agency primarily the place of payment is the place where the constituent resides but payment should be made in any other place if the constituent has chosen to give directions to that effect and that the High Court at Bombay had jurisdiction to try the suit.

*Per CHANDAVARKAR J*—A *pakki adat*'s liability ceases when hard cash has come into the hands of his constituent.

The plaintiff was a merchant and a constituent in Bombay. The defendant was the plaintiff's agent at Akola on *pakki adat* system. Under instructions and directions from the plaintiff the defendant transacted at Akola certain *sodas* (contracts) for the forward sale of *jowari* for the Vanda of Falgun Sud 15th, Samvat 1959 (13th March 1900). The defendant also did business for the plaintiff in cotton, cotton seeds and hundies. In the case of cotton, ready cotton was purchased at Akola, and forwarded to the plaintiff in Bombay.

The defendant remitted cash to Ujjain from Akola on the plaintiff's account for which he subsequently drew hundies on the plaintiff at Bombay which hundies the plaintiff accepted and paid in Bombay.

At the foot of the agency account there was a profit payable to the plaintiff who filed this suit for the recovery thereof and for the agency account. As the defendant resided out of

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Bombay the leave of the Court was obtained under clause 12 of the Letters Patent. The defendant contended in his written statement that this Court had no jurisdiction to entertain this suit as no part of the cause of action had arisen in Bombay.

After filing his written statement the defendant took out a Chamber summons dated 31st March 1907, calling upon the plaintiff to show cause why the leave granted to him under clause 12 of the Letters Patent to institute this suit in this Court should not be revoked and in the alternative why the questions as to whether the monies, if any, due to the plaintiff were payable in Bombay and whether this Court had jurisdiction to try this suit should not be tried as preliminary issues. Affidavits were made on the summons, each party contending that according to the custom of the trade the monies were payable at his place.

Tyabji, J., who heard the summons dismissed the same following his previous decision in *Motilal v. Surajmal* (1).

The defendant appealed against this decision and the appeal Court ordered the following preliminary issue to be tried —

‘Whether the monies, if any, due to the plaintiff are payable in Bombay’

Batty, J., before whom evidence on this preliminary issue was heard decided that the plaintiff had not proved the custom, that the place of payment was the place where the constituent resided, and that therefore the cause of action did not arise within the jurisdiction of this High Court.

The plaintiff appealed.

*Bahadury* (with *Jardine*) for appellants.

We say that the onus is on defendant to establish that the monies were payable at Akola and this onus he has failed to discharge.

Batty, J., held that this onus was on us.

We say the Adatya's duty was to remit and pay in Bombay or if we directed elsewhere then to such place as we might direct.

(1) (1904) 30 Bom 167.



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SURAJMAL.

That is according to the *pakkindat* system see *Bhagwandas v Kanji* (1)

Payments made by Adatya to constituents are made in three ways by (1) hundis (2) currency notes (3) making credit entries in Bombay. The witnesses also agree that the constituent has to bear all the charges including the cost of remittance. If exchange is above par it is debited to the principal if below par it is credited to the principal. See Hiralal Motiram's evidence as to exchange. Interest ceases to run against the Adatya on posting remittance, the reason being that he then ceases to have the use of the money. In case the hundi is lost in transmission the Adatya sends another a *Pett Hundi*. If the drawee fails then the Adatya recovers from the drawer and credits the constituent with principal and interest. Batty J seems to have thought that the above circumstances are against us and to have argued why should the principal bear the charges if the monies were payable in Bombay. Our answer is that that is the system upon which the business is carried on. The important point is that the Adatya as soon as he recovers the money holds the money as agent and as agent would be entitled to all his charges under sections 217 and 218 of the Indian Contract Act. The money is payable in Bombay and the Adatya is bound to pay elsewhere, if so desired. We have given evidence of this and the defendant has given no evidence to the contrary. From incidental charges it appears that the money was to be paid in Bombay. Defendant cannot show that the money was to be paid at Akola. See *Pein v Sierra* (2), *Be'l & Co v Antwerp, London and Brazil Line* (3) *Motilal v Surajmal* (4).

*Porter* with *Weldon* for the respondent

We contend that the evidence shows that both parties intend that the contract should be carried out where the Adatya was. There is no obligation to pay in Bombay. They are entitled to order us to remit the money, because it is theirs, to Bombay, and we should be obliged to carry out those orders taking due precautions for safety but could they call upon us to go to Bombay and pay

(1) (1903) 20 B. M. 203

(2) [1892] 1 Q. B. 73

(3) [1891] 1 Q. B. 104

(4) [1904] 20 Fern. 16

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SURIJMAL

can the e? The Akola merchants nearly all agree that the money is payable at Akola. We belong to Akola therefore how could we have understood that payment was to be made in Bombay *Comber v Leyland* <sup>(1)</sup>, *The Lister* <sup>(2)</sup>, *Irjail Co v Raggio* <sup>(3)</sup>

We cannot admit that payment was to be without application indeed we say that application was necessary. Akola currency would suggest that the contracts were to be performed at Akola. In *Harc v Henty* <sup>(4)</sup> the authorities are collected about a debtor's duty to seek out his creditors.

*Strangman* in reply referred to *Charles Dural & Co, Limited v Gans* <sup>(5)</sup>

CHANDWAI HAF J.—The question in this case is whether the custom set up by the plaintiff is proved. The learned Judge in the Court below has held the custom not proved upon the ground that according to the witnesses both for the plaintiff and the defendant what is proved is that the constituent should be paid the money due to him by his *pakki adatia* at the place where he so desires. The learned Judge has also held that as the plaintiff had not given any directions on that point no part of the cause of action arose within the jurisdiction of this Court and therefore the suit did not lie.

Now, it is to be observed at the outset that the learned Judge has to some extent misapprehended most of the evidence on the custom set up by the plaintiff. The version he has given of some of the evidence is plainly different from what the witnesses have actually said. The effect of the evidence of the witnesses both of the plaintiff and the defendant is summarized by Batty, J., as follows:—The result of the evidence seems to be (1) that as plaintiff admits no place of payment was fixed by the term of the contract (2) that the place of payment was fixed by custom (3) that while plaintiff asserts that, according to custom, the constituent's place of business was the place of payment, most of his witnesses admit that where correspondence is silent on the point payment must be made either where the constituent is or

(1) [1893] A C 524

(2) (1891-92) 40 W R 170

(3) [1893] P 110

(4) (1891) 39 I J C P 707 at p 303

(5) [1901] 1 K B 655

1908.

BEDARNAJ  
SUNJANAL.

at any other place to which he may direct remittance to be sent: and that this is not a matter of courtesy or favour but a rule of business: (4) that the constituent always has to bear the loss or to take the benefit of exchange: (5) the Adatya's liability for interest ceases with the despatch of the bundi."

That is the way Mr. Justice Batty reads the evidence of most of the witnesses for the plaintiff.

A careful perusal of the plaintiff's witnesses has satisfied me that it is not an accurate description of what they have said. The net result of that evidence correctly read is that primarily the place of payment is the place where the constituent resides, which in the present case is Bombay, but that the payment should be made in any other place, if the constituent has chosen to give directions to that effect.

[After discussing the evidence given by different witnesses, his Lordship continued]

Upon the whole, then, I have arrived at the conclusion that the weight of the evidence is in support of the custom set up by the plaintiff. Batty J. would, I think, have come to the same conclusion if he had not misapprehended the evidence of several of the witnesses.

But it was argued that an inference to the contrary must be drawn from certain circumstances, namely, the *hundysman* system and loss of interest on bundis in transit. I do not think that it is a necessary inference from those circumstances that they are inconsistent with the custom set up by the plaintiff. It must be remembered that the transaction we have to deal with is one between a principal and his agent. Where the latter has to remit to the former moneys which he has collected for the principal he is certainly entitled to charge all the expenses he has to incur in collecting and sending. The evidence shows that *hundysman* is charged on that account as part of the contract. It is but reasonable that if the custom is that an up-country agent should pay to his principal in Bombay moneys collected by the former on the latter's account, the agent ought to debit the principal with charges incurred in remitting the moneys to Bombay, and that the principal should lose interest

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KEDARNATH  
&  
SUDJAMAL.

during transit. That is also the conclusion come to by Bitty J., at the page 114 where he remarks:—"The evidence in this case shows that he undertakes to send such profits not as a debt due from himself but as proceeds realized by him on the constituent's charges, and custom recognises that he is entitled to such charges as an agent as under section 217 of the Contract Act for expenses properly incurred by him in conducting such business." If then these are the terms of the contract we do not see how they affect the material question as regards the custom set up by the plaintiff. The learned Advocate General has however sought to bring this case within the principle of *Comber v. Leyland* (1). He has argued that what the evidence establishes is that the up country *pikka aditya* has to remit the money to his constituent in Bombay and when he has remitted the money by means of a hundi, then his obligation is at an end. No doubt some of the witnesses have spoken of remittance but they were not asked whether they understood payment and remittance as synonymous expressions. It is merely speculating to suppose that they so understood, especially when we find that most of the witnesses have distinctly stated that the up country *aditya's* liability ceases, not when he has simply remitted the money but when the money in cash is received by the constituent. One of the witnesses examined by the defendant, viz. Ramanand, says (page 66) that the constituent will not give credit to the *Aditya* merely because the latter has sent a hundi for moneys due, credit will be given after the constituent has cashed and received actual payment. The effect of the evidence is to prove that the *pikka aditya's* liability ceases when hard cash has come into the hands of his constituent. That circumstance distinguishes the present case from *Comber's*.

For these reasons, I think the decree of the Court below must be reversed and as the learned Judge in that Court disposed of the suit on a preliminary point, we must remand it for trial on the merits. Plaintiff must bear the costs of the previous hearing of the appeal and have the costs of the present appeal heard before us and the costs of the issues tried in the Court below.



1908

ABDARMAH  
v  
ABDARMAH.

BATCHELOR J.—I agree with my learned colleague in the order he has proposed but in deference to the arguments we have heard I think it is desirable to state my views as briefly as possible

The only question before us is whether the money payable under this contract is payable in Bombay so that the cause of action may be said to have arisen in part within the jurisdiction

Now it seems to me that this case is one which depends entirely upon its own evidence. What does the evidence show? Does it show that the money is payable in Bombay or does it show only that the money is payable where the principal, the creditor, elects to be paid? In my opinion it shows that the money is payable in Bombay with a discretion to the principal to select some other place for payment if he chooses to do so [His Lordship discussed the evidence of several witnesses and continued] —

Then it is said that inference is displaced by the circumstance that admittedly it is the principal who has to bear the charges on account of remittance and of exchange, this latter item including the item of interest. But I cannot take that view. The principal's liability for these charges, if it stood alone, would no doubt be some indication that payment was to be made at Akola, though the indication would be faint inasmuch as the Agent's authority to deduct these charges may be referred to section 217 of the Contract Act. But however that may be, in my opinion the best answer to the argument is this, that the evidence must be considered as a whole and so considered, it shows that by the ordinary mercantile usage attached to this form of contract the contract embodies both stipulations, first, that the money should be payable in Bombay, and secondly, that the Agent should be entitled to deduct these charges. I can see no reason why these two stipulations should not co-exist in the same contract if the parties are minded to combine them. And on the evidence in this case I find that that is precisely what the plaintiff and the defendant elected to do. That in my opinion is the contract which they made. Some assistance to the respondent was sought to be obtained from the use of the phrase

'Akola chalan,' but the word 'chalan' means no more than currency and the Akola currency is admittedly the British currency. That being so, it seems to me that the only distinction sought to be introduced was the distinction between the British currency of Akola and the currency of the neighbouring Native State which borders upon Akola. It may be desirable just to notice the case of *Lamin Chetty v Gopalichari* (1), though it has not been cited to us. That case is distinguishable inasmuch as there the only fact in the plaintiff's favour was that he resided at Kumbakonam, and there was no evidence that the debt was payable at Kumbakonam.

For these reasons I agree in the order proposed by my learned colleague.

Attorneys for the appellant — *Messrs Wadia, Gandhi & Co.*

Attorneys for the respondent — *Messrs Dilshit, Dhunjishah and Sonolaldas*

B. N. L.

(1) [1908] 31 Mad. 223

## APPELLATE CIVIL.

*Before Mr Justice Clandavarhar and Mr Justice Heaton*

PANCHHODDBHAI VALLUVBHAI (ORIGINAL CLAIMANT), APPELLANT,  
v THE COLLECTOR OF KAIRA, RESPONDENT.

1909

February 1

*Bombay Civil Courts Act (XIV of 1869) section 16—Land Acquisition Act (I of 1894)—Assistant Judge hearing a claim—Value of the claim under Rs 5000—Appeal lies to District Court and not to High Court—Jurisdiction—Practice and procedure*

Where a claim under the provisions of the Land Acquisition Act, 1894 is heard by the Assistant Judge and the amount in dispute does not exceed Rs 5000 in value, the appeal lies to the District Court and not to the High Court.

*Larmi v Aba* (1), followed.

APPEAL from the decision of K. Barlee, Assistant Judge of Ahmedabad.

• First Appeal No 149 of 1907.

(1) [1906] 32 Bom 631, 10 Bom L R 621

1908.

KEDARNATH  
v  
LURAJMAL.

BACHELOR J.—I agree with my learned colleague in the order he has proposed but in deference to the arguments we have heard I think it is desirable to state my views as briefly as possible

The only question before us is whether the money payable under this contract is payable in Bombay so that the cause of action may be said to have arisen in part within the jurisdiction

Now it seems to me that this case is one which depends entirely upon its own evidence. What does the evidence show? Does it show that the money is payable in Bombay or does it show only that the money is payable where the principal, the creditor, elects to be paid? In my opinion it shows that the money is payable in Bombay with a discretion to the principal to select some other place for payment if he chooses to do so [His Lordship discussed the evidence of several witnesses and continued] —

Then it is said that inference is displaced by the circumstance that admittedly it is the principal who has to bear the charges on account of remittance and of exchange, this latter item including the item of interest. But I cannot take that view. The principal's liability for these charges, if it stood alone, would no doubt be some indication that payment was to be made at Akola, though the indication would be faint inasmuch as the Agent's authority to deduct these charges may be referred to section 217 of the Contract Act. But however that may be, in my opinion, the best answer to the argument is this, that the evidence must be considered as a whole and, so considered, it shows that by the ordinary mercantile usage attached to this form of contract, the contract embodies both stipulations first, that the money should be payable in Bombay, and secondly, that the Agent should be entitled to deduct these charges. I can see no reason why these two stipulations should not co-exist in the same contract if the parties are minded to combine them. And on the evidence in this case I find that that is precisely what the plaintiff and the defendant elected to do. That in my opinion is the contract which they made. Some assistance to the respondent was sought to be obtained from the use of the phrase

'Akola chalan,' but the word 'chalan' means no more than currency and the Akola currency is a limit edly the British currency. That be ng so, it seems to me that the only distinction sought to be introduced was the distinction between the British currency of Akola and the currency of the neighbouring Native State which borders upon Akola. It may be desirable just to notice the case of *Lamin Chet'iyar v Gopicharan* (1), though it has not been cited to us. That case is distinguishable inasmuch as there the only fact in the plaintiff's favour was that he resided at Kumbakonam, and there was no evidence that the debt was payable at Kumbakonam.

For these reasons I agree in the order proposed by my learned colleague.

Attorneys for the appellant — *Messrs Wadia, Gandhi & Co.*

Attorneys for the respondent — *Messrs Dilshit, Dhunjishah and Soonderdas.*

B. N. L.

(1) [1908] 31 Mad 123

## APPELLATE CIVIL.

*Before Mr Justice Chandavarkar and Mr Justice Heaton*

RANCHHODDHAJ VALLUVBHAI (ORIGINAL CLAIMANT), APPELLANT,  
v THE COLLECTOR OF KAIRI, RESPONDENT \*

1909

February 1

*Bombay Civil Courts Act (XIV of 1869) section 16—Land Acquisition Act (I of 1894)—Assistant Judge hearing a claim—Value of the claim under Rs 5000—Appeal lies to District Court and not to High Court—Jurisdiction—Practice and procedure*

Where a claim under the provisions of the Land Acquisition Act, 1894, is heard by the Assistant Judge and the amount in dispute does not exceed Rs 5000 in value, the appeal lies to the District Court and not to the High Court.

*Laxmi v Ala* (1), followed

APPEAL from the decision of K Barlee, Assistant Judge of Ahmedabad

\* First Appeal No 149 of 1907.

(1) (1908) 32 Bom 631; 10 Bom L R 821

1909

НАУЧНОЕ  
ВРАЧ  
и  
COLLECTOR  
OF KAIRA

The Collector of Kaira, acting under the powers conferred upon him by the Land Acquisition Act (I of 1894), compulsorily acquired 1 acre and 30 guntas of lands belonging to the claimant, for the purpose of building a hostel for the students of the Nadial High School

The District Deputy Collector of Kaira, acting as Collector for the purposes of land acquisition fixed the compensation at the rate of Rs 1600 per acre and awarded Rs 925 to claimant for the land acquired

The claimant claims Rs 4000 per acre and applied to the Court of the Assistant Judge of Ahmedabad

The Assistant Judge found the claim in excess not proved and confirmed the order passed by the lower Court.

The claimant appealed to the High Court

G S Rao, for the appellant

M H Chouda, Government Pleader, for the respondent

At the hearing, the Government Pleader raised the preliminary objection that the appeal lay to the District Court and not to the High Court

CHANDAYARKAR J.—Following the ruling in *Jurim v. Aba*<sup>(1)</sup>, the reasoning of which applies to the facts of the present case, we must hold that no appeal lies to this Court from the order of the Assistant Judge, but that the appeal lies to the District Court. We therefore, return the appeal for presentation to the District Court

The respondent must have his costs of this appeal

R P

(1) (1908 32 Bom 631 10 Bom L R 923)

## APPELLATE CIVIL.

Before Mr Justice Chandavarkar

KRISHINAJI PANDURANG SATHE (ORIGINAL DEFENDANT), APPELLANT,  
v. GAJANAN DALVANT KULKARNI (ORIGINAL PLAINTIFF)  
RESPONDENT \*

1909  
February 12.

*Jurisdiction—Tipnis Pansare right—Right to levy toll on exports of paddy from foreign territory—Such a right is nibandha under Hindu law—The right is immovable property—Suit to enforce the right in British Courts*

The plaintiff sued to recover from the defendant a certain sum of money on account of toll leviable, under a grant from the Peshwas and known as the Tipnis Pansare right, on paddy exported from the territory of the Punt Sachiv to Pen, via Umber Khind in British territory. The cause of action arose admittedly in foreign territory, but it was contended the suit lay in the British Courts because the defendant resided in British jurisdiction.

*Held*, overruling the contention, that what the plaintiff claimed was an allowance granted by the Peshwa in permanence, and such an allowance whether secured on land or not, being according to Hindu law, *nibandha*, was immovable property.

*The Collector of Thana v Haris Sitaram*(1), followed.

*Held*, further that this immovable property was situate, in the eye of law, in a foreign state, and that the British Court had no jurisdiction to try a suit for the determination of a right to or interest in the property, when the right was denied.

*Keslav v Isayal*(2), applied.

The Courts in India have jurisdiction to try actions relating to such property where the persons against whom relief is sought are living within the jurisdiction, but that is upon the ground of a contract or some equity subsisting between the parties respecting immovables situated out of the jurisdiction.

SECOND appeal from the decision of F. X. DeSouza, District Judge at Thana, confirming the decree passed by S. G. Kharhar, Subordinate Judge at Pen.

Suit to recover a sum of money from the defendant.

The plaintiff was the holder of a right, known as the Tipnis Pansare right, which consisted in levying a certain fee or rate

\* Second Appeal No 663 of 1907.

(1) (1862) 6 Bom 540

(2) (1897) 23 Bom. 22.

1900

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PANDURANGGAJANAN  
BALYANT

on all imports into and exports from the Senghad Taluka, which now forms part of the territory of Punt Suchiv of Bhor. The right in question was to levy two annas on every khandy of paddy carried from the territory of Punt Suchiv to Pen, vid Umber Khind. The right was conferred on the plaintiff by the Peshwas.

The plaintiff filed this suit to recover the sum due to him in exercise of this right from the defendant.

The defendant pleaded among other things want of jurisdiction.

The Subordinate Judge held that the suit was bad for want of jurisdiction. He said as follows —

‘ *Keshav v. Vinayak*<sup>(1)</sup> shows that suits as to rights in respect of immovable property arising in States must be filed in the Courts of the States themselves. A *varshashan* allowance was in dispute in the above suit. Hence, in the present case the right to levy fees on carts passing by a particular road is also similar to the above right of *varshashan* allowance. Hence, the present suit must be filed in the Court of Pali and not in this Court.”

This finding was on appeal reversed by the lower appellate Court, and the case was remanded for trial on merits. The learned Judge remarked —

‘ The ruling in *Keshav v. Vinayak*<sup>(1)</sup> does not apply in the case. The *varshashan* referred to therein was a charge on the revenue of a village which is clearly different from the claim in the present case where it is a fee on carts taken from one place to another. In the case referred to the *varshashan* was to be taken from the Nizam's territory at Aurangabad. There is no such thing in this case.

In trying the case upon its merits the Subordinate Judge found the plaintiff's claim proved. His decree was, on appeal, confirmed by the lower appellate Court.

The defendant appealed to the High Court.

*P. P. Khare* for the appellant. — The question involved in this case is one of *usbandha*, which is immovable property, and, therefore, the suit ought to have been instituted in the territories of the Native State where the right is to be exercised. See *Keshav v. Vinayak*<sup>(1)</sup> and Dicey's Conflict of Laws, Introduction.

*P. B. Shingne*, for the respondent —The suit is one for recovering an amount of money due in respect of a right. We do not sue to recover immoveable property, such a suit is governed by section 17 of the Civil Procedure Code of 1882

We sue for money, and the defendant raises a question of title. In such a case the question of jurisdiction has to be decided by reference to the plaint and not by looking at the stand taken by the defendant.

CHANDAYARKAR, J. —The action in this case was brought by the respondent to recover a certain sum of money from the appellants on account of toll leviable on paddy exported from the territory of the Punt Suchiv to Pen via Umber Khind in British territory. The respondent alleged in his plaint and it is found proved by both the Courts below that under a grant from the Peshwas who were the rulers at that time of the territory now owned by the Punt Suchiv, the respondent has acquired the right in that territory to levy a certain rate or cess on all imports into and exports from it. It goes by the name of the *Pipnis Pansare* right.

It is admitted before me that the cause of action arose in foreign territory but it is contended that the suit lies in our Courts because the defendant resides in British jurisdiction. What the respondent claims, however, is an allowance granted by the Peshwa in perpetuity, and such an allowance, whether secured on land or not, being according to Hindu law, *utbandha*, has been held to be immoveable property. *The Collector of Thana v. Hari Sitaram*<sup>(1)</sup>. This immoveable property is situate, in the eye of law, in a foreign State because, on the facts found, the right to levy the toll which the respondent claims is found to arise in the territory of the Punt Suchiv. To this state of facts the principle of the decision of this Court in *Keshav v. Vinayak*<sup>(2)</sup> applies. It was held there that a Court in British India has no jurisdiction to try a suit for the determination of a right to or interest in immoveable property situated outside British India, where the right is denied. In the present case

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(1) (1887) 6 Bom 546 at p. 552

(2) (1897) 23 Bom 22



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PANDURANG  
v  
GAJANAN  
BALVANT

the respondent's claim has been contested by the appellant, and, though the suit is for a money claim, it is in reality a claim to immovable property situate outside British territory

Our Courts, no doubt, have jurisdiction to try actions relating to such property where the persons against whom relief is sought are living within the jurisdiction but that is "upon the ground of a contract or some equity subsisting between the parties respecting immovables situated out of the jurisdiction." See the notes to *Penn v Lord Baltimore*<sup>(1)</sup>. There is no contract or equity here. On the other hand, what the respondent claims and what is found on the evidence is that the ruling power of a foreign State has assigned to the respondent the right of that power to levy toll on certain articles in that territory. "The action is in the nature of an action for a penalty or to recover a tax, it is analogous to an action brought in one country to enforce the revenue laws of another. In such cases it has always been held that an action will not lie outside the confines of the last mentioned State." *Sydney Municipal Council v Bull*<sup>(2)</sup>.

For these reasons the decree of the Court below must be reversed and the claim rejected with costs throughout on the respondent.

*Decree reversed*

R R

(1) 1 Wh & Ta L Cas p 768 (7th edn) (2) [1909] 1 K B at p 12

## APPELLATE CIVIL

*Before Mr Justice Chandavarkar and Mr Justice Heaton*

1909  
March 15

CHUNILAL HARICHAND GUJAR (ORIGINAL PLAINTIFF) APPELLANT  
v VINAYAK ANANDRAO (ORIGINAL DEFENDANT) RESPONDENT\*

*Dekkhan Agriculturists Relief Act (XVII of 1879), sec 2—'Agriculturist'—Interpretation—"Earns his livelihood"—Sources of income*

In ascertaining whether a man who has two or more sources of income which the income from agriculture is one, occupies the status of agriculturist as defined in the Dekkhan Agriculturists Relief Act (XVII of 1879), the Con

\* Appeal No 41 of 1908, from order

1900.

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v.  
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must take into account all these sources and ascertain whether the income derived from agriculture is larger or smaller than the rest. All the sources must be taken into the scale of livelihood and if the income from agriculture exceed the other incomes he must be deemed to be earning his livelihood principally by agriculture.

*Deputy Joint Magistrate, Baitarkhwa Taluk, and District Magistrate explained.*

APPEAL from order passed by S. S. Wagle, First Class Subordinate Judge, A. P., at Thána reversing the decree passed by B. D. Subnis, Subordinate Judge at Kalyán.

Proceedings in execution.

The plaintiff held a decree against the defendant. He applied to execute the decree and in the proceedings that followed the defendant pleaded that he was an agriculturist.

The Subordinate Judge took evidence upon the point and came to the conclusion that the defendant was not an agriculturist, on the following grounds—

It is unquestionable that defendant derives his income from agricultural sources. He was examined by the Court—and also as a witness on his own side, (Exhibits 21 to 23). He has put in assessment receipts (Exhibits 27 to 30), and examined witness exhibits 39 to 43. He has also put in some leases but they were not proved. The whole of the evidence on record shows that the defendant's income from agriculture amounts to Rs. 300 at the most after paying Government assessment and the expenses of cultivation, defendant himself in his deposition (Exhibit 21) not only practically admits this but that deposition further shows that his income from this source is even less. He on the other hand states that he has ten annas share in the revenues of the Inám village of Atgion. He has also purchased a one anna share from another Inámdár of the same village. The revenues of the village amount to about Rs. 1,000 (Exhibits 21, 23, and 33) and the defendant admits that his income from this source amounts to Rs. 200 a year (Exhibit 21) and that he got Rs. 700 last year on account of ground rent. His deposition (Exhibit 25) makes it clear that he derives a part of his annual income from the village ground rent and though the amount of it is not certain yet calculating on the basis of the rent received last year viz., Rs. 700 it may safely be presumed that it amounts to at least half the amount annually on an average. Then again defendant is forced to admit that he has got tenants at Sháhápur—paying about Rs. 80 annually as rent. He no doubt says that he does not recover more than Rs. 20 or 30 out of it but this statement is not borne out by any reliable evidence on the record. Even assuming that what the applicant states in his two depositions can by itself be taken as giving a correct idea as to his income from different sources, I find nothing in them to support the applicant's contention that his income

1909

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v  
GAJANAN  
BALFANT

the respondent's claim has been contested by the appellant, and, though the suit is for a money claim, it is in reality a claim to immovable property situate outside British territory

Our Courts, no doubt, have jurisdiction to try actions relating to such property where the persons against whom relief is sought are living within the jurisdiction but that is "upon the ground of a contract or some equity subsisting between the parties respecting immovables situated out of the jurisdiction." See the notes to *Penn v Lord Baltimore*<sup>(1)</sup>. There is no contract or equity here. On the other hand, what the respondent claims and what is found on the evidence is that the ruling power of a foreign State has assigned to the respondent the right of that power to levy toll on certain articles in that territory. "The action is in the nature of an action for a penalty or to recover a tax, it is analogous to an action brought in one country to enforce the revenue laws of another. In such cases it has always been held that an action will not lie outside the confines of the last mentioned State." *Sydney Municipal Council v Bull*<sup>(2)</sup>.

For these reasons the decree of the Court below must be reversed and the claim rejected with costs throughout on the respondent.

*Decree reversed*

R R

(1) 1 Wh & L Cas p 763 (11th edn) (2) [1909] 1 K B 7 at p 12

## APPELLATE CIVIL

*Before Mr Justice Chandavarkar and Mr Justice Heaton*

CHUNILAL HARICHAND GUJAR (ORIGINAL PLAINTIFF) APPELLANT  
v VINAYAK ANANDRAO (ORIGINAL DEFENDANT) RESPONDENT \*

*Dekhan Agriculturists Relief Act (XVII of 1879) sec 2—'Agriculturist'*  
—Interpretation— *Earns his livelihood* —Sources of income

In ascertaining whether a man who has two or more sources of income of which the income from agriculture is one, occupies the status of agriculturist as defined in the Dekhan Agriculturists Relief Act (XVII of 1879), the Court

\* Appeal No 44 of 1908, from order

1909

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C.  
VIRAYAK.

must take into account all these sources and ascertain whether the income derived from a source is larger or smaller than the rest. All the sources must be taken to be the means of livelihood and if the income from agriculture exceed the other sources he must be deemed to be earning his livelihood principally by agriculture.

*Dwarkeyar Bhatkar v. Balkrishna Bhalekar*(1) explained.

APPEAL from order passed by S. S. Wagle, First Class Subordinate Judge, A. P., at Tháná reversing the decree passed by B. D. Subnis, Subordinate Judge at Kalyán.

Proceedings in execution.

The plaintiff held a decree against the defendant. He applied to execute the decree and in the proceedings that followed the defendant pleaded that he was an agriculturist.

The Subordinate Judge took evidence upon the point and came to the conclusion that the defendant was not an agriculturist, on the following grounds—

It is undisputed that defendant derives his income from agricultural sources. He was examined by the Court—and also as a witness on his own side, (Exhibits 21 to 25). He has put in assessment receipts (Exhibits 27 to 36) and examined witnesses exhibits 34 to 43. He has also put in some leases but they were not proved. The whole of the evidence on record shows that the defendant's income from agriculture amounts to Rs. 300 at the most after paying Government assessment and the expenses of cultivation, defendant himself in his deposition (Exhibit 21) not only practically admits this but that deposition further shows that his income from this source is even less. He on the other hand states that he has ten annas share in the revenues of the Inám village of Atgion. He has also purchased a one anna share from another Inámdár of the same village. The revenues of the village amount to about Rs. 1000 (Exhibits 21, 22 and 33) and the defendant admits that his income from this source amounts to Rs. 200 a year (Exhibit 21) and that he got Rs. 700 last year on account of ground rent. His deposition (Exhibit 25) makes it clear that he derives a part of his annual income from the village ground rent and though the amount of it is not certain yet calculating on the basis of the rent received last year viz. Rs. 700 it may safely be presumed that it amounts to at least half the amount annually on an average. Then again defendant is forced to admit that he has got tenants at Shábápur—paying about Rs. 80 annually as rent. He no doubt says that he does not recover more than Rs. 25 or 30 out of it but this statement is not borne out by any reliable evidence on the record. Even assuming that what the applicant states in his two depositions can by itself be taken as giving a correct idea as to his income from different sources I find nothing in them to support the applicant's contention that his income

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v  
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from agriculture exceeds that from other sources I therefore hold that he is not an agriculturist within the meaning of section 2 of the Delkhar Agriculturists' Relief Act. I therefore find the first issue in the negative. The more delicate question as to whether any relief can be granted to the applicant when the execution proceedings are once at an end does not consequently arise. I therefore pass the following order inasmuch as defendant applicant being held not to be an agriculturist is not entitled to reliefs prayed for.

This decree was on appeal reversed by the lower appellate Court, on the following grounds —

It appears to me that the learned Subordinate Judge has approached the consideration of this case from an erroneous point of view. He says. Even assuming that what applicant states in his two depositions can by itself be taken as giving a correct idea as to his income from different sources I find nothing in them to support the applicant's contention that his income from agriculture exceeds that from other sources. I therefore hold that he is not an agriculturist. This view cannot be supported. It is not necessary for a man claiming the status of an agriculturist under the definition in the Agriculturists' Relief Act to show that his income from agriculture exceeds his income from other sources. All that is necessary is to show that his income from agriculture is sufficient to enable him to earn his livelihood wholly or principally. He may have other sources of income and that income may be sufficient for his maintenance. But that fact will not affect the construction of the definition. *Diwarkojirav v Balkrishna*<sup>(1)</sup>. What we have to see is therefore not whether the judgment debtor's income from agriculture exceeds his income from other sources but whether the income from agriculture is sufficient for his maintenance. It is not disputed that the judgment debtor owns lands about 40 or 45 acres situated at Adgaum, Shalipar and Nandgaum which are all adjoining villages. He cultivates some land (about 20 bighas) privately and has let the rest to tenants. He says that his income from these lands is about Rs. 500 to Rs. 600. He has called witnesses Nos 33, 39 and 40. From their evidence, I hold that the income from lands is about Rs. 350 to Rs. 400 a year clear of Government assessment and costs of cultivation. To this is to be added the income from grass Rs. 40 or Rs. 50. For grass may very well be classed as agricultural produce. The judgment debtor stated that this income was sufficient for his maintenance. The decree-holder has not produced any evidence nor shown by the cross-examination of the judgment debtor that the agricultural income is not sufficient for the maintenance of the judgment debtor. Ordinarily this income would be sufficient to maintain a man and there is nothing to show that the judgment debtor's style of living is other than ordinary. No doubt in the lower Court no inquiry was directed as to the amount required for the judgment debtor's maintenance. But when the judgment debtor stated his agricultural income and alleged in his application that he maintained himself principally by

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agriculture it was for the decree holder to show that agricultural income is not sufficient to maintain the judgment debtor. The decree holder however called no evidence. I therefore held that the agricultural income is sufficient to maintain the judgment-debtor and that he is an agriculturist.

The plaintiff appealed to the High Court

*M B Chaudat* (Government Pleader), for the appellant.

*H F Vidwans*, for the respondent

CHANDAVARKAN, J.—The learned Judge in the appeal Court below has misunderstood the judgment of this Court in *Dwarkanav Baburav v. Balkrishna Bhalchandra*<sup>(1)</sup> in construing the word "agriculturist" as defined in the Dekkhan Agriculturists' Relief Act. He says that "it is not necessary for a man claiming the status of an agriculturist under the definition in the Agriculturists' Relief Act to show that his income from agriculture exceeds his income from other sources." That is not what was held in *Dwarkanav Baburav v. Balkrishna Bhalchandra*<sup>(1)</sup>. In that case, as the facts show, when the suit was instituted the income from non agricultural sources had become less than that from agriculture, and the Court held that that circumstance brought the plaintiff within the definition. The judgment begins by pointing out that the expression "earns his livelihood" can only mean obtains the means of maintaining himself. In ascertaining whether a man who has two or more sources of income, of which the income from agriculture is one occupies the status of agriculturist as defined in the Act, the Court must take into account all those sources and ascertain whether the income from agriculture is larger or smaller than the rest. All the sources must be taken to be means of his livelihood, and, if the income from agriculture exceed the other incomes, he must be held to be earning his livelihood principally by agriculture. That is the interpretation which has been hitherto placed by this Court in all the cases in which this point has arisen, following *Dwarkanav Baburav v. Balkrishna Bhalchandra*<sup>(1)</sup>. We reverse the decree and remand the appeal for rehearing on the merits. Costs to abide the result.

*Decree reversed.*

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See CIVIL PROCEDURE CODE ... 475







**INSOLVENCY ACT, INDIAN (11 AND 12 VICT c 21), SECS 7, 23 AND 36—**  
*Insolvent's property at Shanghai—Property of insolvents at Shanghai vests in Official Assignee of the Insolvent Debtors' Court at Bombay—Court can order insolvent at Shanghai to hand over property to Official Assignee in Bombay—Court can order commission to examine insolvent at Shanghai* ] The firm of T and Co filed their petition in insolvency in Bombay on 29th April 1907 at which time one of the partners M was at Shanghai. M subsequently swore his petition at Shanghai on 16th October 1907.

On 16th March 1907 certain creditors of the firm obtained an order directing M, to appear before the Court of Insolvent Debtors at Bombay to be examined under section 36 of the Indian Insolvency Act.

A Rule nisi was obtained on behalf of M calling upon the opposing creditors to show cause why the above order should not be set aside.

These creditors also obtained a Rule nisi calling on M to show cause why he should not deliver up to the Official Assignee goods belonging to the insolvent firm in his possession at Shanghai.

These two Rules were heard together.

*Held*, that the property of the insolvent debtors' firm in Shanghai vested in the Official Assignee of the Insolvent Debtors' Court at Bombay, and that Court could order M to hand over such property to the Official Assignee in Bombay.

*Held*, further, that the Insolvent Debtors' Court at Bombay can order the examination of a witness at Shanghai, but cannot direct a witness to come to Bombay to be examined, there being no machinery for that purpose.

IN RE NAORJI SOHABJI TALATI ... .. (1908) 33 Bom 452

**JURISDICTION—***Insolvent's property at Shanghai—Property of insolvents at Shanghai vests in Official Assignee of the Insolvent Debtors' Court at Bombay—Court can order insolvent at Shanghai to hand over property to Official Assignee in Bombay—Court can order commission to examine insolvent at Shanghai* ]

See INSOLVENCY ACT (INDIAN) ... .. 462

**Power of High Court to restrain by injunction a person from proceeding with a suit in the Small Causes**  
 has inherent power to restrain by injunction  
 High Court from proceeding in the Small  
 filed by the defendant referring to the  
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*Juranddas v. Zamonal* (1903) 27 Bom. 307, not followed

UDERAM KESAJI t. HYDERALLY ... .. (1908) 33 Bom 469

**LAND ACQUISITION ACT (1 OF 1893), SEC 23—"Market value of land"—**  
*Methods of assessing the market value—Correct methods laid down—City of Bombay Improvement Act (Bombay Act IV of 1898)—Valuation by Collector—Acquisition of interest by claimant after Collector's award—References to the Tribunal of Appeal—Consolidation of references* ] The Government of Bombay, acting on behalf of the Improvement Trustees, under the City of Bombay Improvement Act (Bombay Act IV of 1898), notified for acquisition nine parcels of land in December 1893. At the date of the notification, J, the owner of the parcels, was in unencumbered possession of only one of them, and the remaining







parcels were let on permanent leases as building sites. Between the dates of

cases, references were claimed and under section 48 of the City of (1898). After the Collector had

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Appeal allowed J's claim for compensation for the whole land on a quarrying basis. On appeal, it was objected that the consolidation was wrongly allowed for J was thereby permitted to advance a claim—namely the claim to the quarrying value—which otherwise he would not have been able to make.

*Held*, that the consolidation was not the effect which was contended for of references that J. was enabled to put a quarrying claim that claim was already be whether good or had, had to be decided on quite other grounds than the arbitrary division of the land made by the Collector.

*Held*, further, that compensation should not be assessed on a quarryable basis, for the land was never a marketable quarry at the material time, and did not become so till after the Collector had made his award.

certaining the market value of  
of (1 of 1894) the Court must  
cular piece of land in question

*Collector of Belgaum v. Bhimrao* (1903) 10 Bom L. R. 657, followed

The method contemplated by the Land Acquisition Act (I of 1894) for assessing compensation is that of ascertaining first the market value of the land as if all separate interests combined to sell, and then of apportioning that value among the persons interested. The "market value of the land" means market for a concrete parcel of land without any particular drawbacks, both advantages and disadvantages, reference to commercial value than with reference to any abstract legal rights.

*Per HEATON, J.*—Taking the scope of the Land Acquisition Act (I of 1894) and its words, it seems that in ascertaining compensation for land taken up neither the method of valuing each interest in it separately nor the method of valuing the land as a whole and then apportioning to each person interested the share to which he is entitled, is excluded. What is intended is a fair and reasonable estimate of the compensation to be awarded and this is to be arrived at by taking into account the actual use of the land.

which does not conflict with what was decided in *Collector of Belgaum v. Bhimrao* (1903) 10 Bom L. R. 657.

BOMBAY IMPROVEMENT TRUST v. JALNOR ..

... (1909) 33 Bom 133









(levirate), if her co wife has a son born of her. Culluca Bhatta and Raghavananda explain that the text is intended to prohibit adoption by the wife who has a son born of her. And the context in which this text of Manu finds its place in his *Smṛiti* supports that view. It is immediately preceded by another text which declares, "If among brothers sprung from one (father), one have a son, Manu has declared them all to have male offspring through that son" [Sacred Books of the East Vol. XXV, Ch. IX, 182]. Vyāneshwara in the *Mitākshara* quotes this text and explains that it "is intended to forbid the adoption of others if a brother's son can possibly be adopted. It is not intended to declare him son of his uncle" [The Mit. Ch. I. Sec. XI, plac. 36, Stokes's Hindu Law Books, page 424]. If this text has this limited meaning and scope, the other text relating to the son of a co-wife, must have its scope similarly narrowed having regard to the fact that it occurs immediately after the former. And that is the view which has commended itself to their Lordships of the Privy Council as to the scope of both these texts of Manu. See *Annappurni Nachiar v. Forster*<sup>(1)</sup> where their Lordships say — "Reference has been made to the text of Manu (Book IX Shloka 183) in which he declares that if of several wives one brings forth a male child, all shall by means of that child be mothers of male issue. In the preceding Shloka he declares that if among several brothers of the whole blood one have a son born they are all made fathers of a male child by means of that son. We must suppose that all take the spiritual benefits of male issue but the law is clear that for the purposes of inheritance the natural mothers and fathers respectively are preferred."

Certain commentaries such as the *Madana Prājñā* and the *Vivadarnava Setu* no doubt assert the right of the son of a rival wife of a woman to inherit the *stridhan* of the latter before her husband, but for the reasons we have given in this judgment, their view must be held to find no support from either the *Mitākshara* or the *Vyavahāra Mayukha* nor the author of the *Smṛiti Chandrikā*. The last says "The issue of a rival wife

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takes the property of the step-mother, where the latter leaves no progeny, husband, or the like". [Smriti Chandrika, Kristoosawmy Iyer's Ed. 2nd, page 135, section 38.]

That the husband of a childless woman is entitled to inherit her *stridhan* before a son by another wife of his seems to us to follow as a necessary corollary to certain decisions of this Court. In *Kessabai v. Valab Raoji*<sup>(1)</sup> it was held that a step-mother could not inherit her step-son's property under the term "mother" but that she could come in only as a *gotraja sapinda* on the authority of the decisions in *Lakshmbai v. Jayram Hari*<sup>(2)</sup> and *Lallubhai v. Mankurarbai*<sup>(3)</sup>. If a step-mother cannot come in as "mother" in the line of heirs to her step-son but can only come in as a *gotraja sapinda*, it follows, from the same reasoning, that the step-son cannot come in as "son" but can inherit only as a *gotraja sapinda* of his step-mother.

For these reasons the decree appealed from must be confirmed with costs.

*Decree confirmed.*

R R

(1) (1879) 4 Bom. 188 at p. 208.

(2) (1869) 8 Bom. H. C. Rep 152 (A C J)

(3) (1876) 3 Bom 383.

## ORIGINAL CIVIL.

*Before Mr Justice Russell*

*IN RE NAOROJI SORABJI TALATI \**

1908.

July 22

*Indian Insolvency Act (11 and 12 Vict. c. 21), secs. 7, 23 and 35—In solvent's property at Shanghai—Property of insolvents at Shanghai vests in Official Assignee of the Insolvent Debtor's Court at Bombay—Court can order insolvent at Shanghai to hand over property to Official Assignee in Bombay—Court can order commission to examine insolvent at Shanghai*

The firm of T and Co filed their petition in insolvency in Bombay on 29th April 1907 at which time one of the partners M was at Shanghai. M. subsequently swore his petition at Shanghai on 16th October 1907

On 16th March 1907 certain creditors of the firm obtained an order directing M. to appear before the Court of Insolvent Debtors at Bombay to be examined under section 31 of the Indian Insolvency Act

A Rule nisi was obtained on behalf of M calling upon the opposing creditors to show cause why the above order should not be set aside.

These creditors also obtained a Rule nisi calling on M, to show cause why he should not deliver up to the Official Assignee goods belonging to the Insolvent firm in his possession at Shanghai.

These two Rules were heard together.

*Held*, that the property of the insolvent debtor's firm in Shanghai vested in the Official Assignee of the Insolvent Debtors Court at Bombay, and that Court could order M to hand over such property to the Official Assignee in Bombay.

*Held*, further that the Insolvent Debtors Court at Bombay can order the examination of a witness at Shanghai but cannot direct a witness to come to Bombay to be examined there being no machinery for that purpose.

*THE* firm of Talati & Co consisting of four partners on the 20th April 1907 filed their petition in insolvency in the High Court at Bombay. At the time the petition was filed one of the partners Maneckji Pestonji Talati was at Shanghai having gone there in October 1906 to look after the affairs of the firm. Accordingly he did not join in the petition. Subsequently Maneckji Pestonji Talati swore his petition at Shanghai on 16th October 1907, and that petition was presented to Russell, J. in the Insolvency Court at Bombay on 4th December 1907. Russell J. took time to consider his judgment which he delivered on 11th December 1907 rejecting the petition on the ground that Maneckji Pestonji Talati was not within the jurisdiction of the Court<sup>(1)</sup>.

Among the creditors of the insolvents was the firm of Abhechand Goculdas who had obtained a decree against the insolvents for Rs 16,951 on the 8th April 1907.

These creditors on the 4th March 1908 applied for and obtained an order directing Maneckji under section 36 of the Indian Insolvency Act to personally appear before the Court on the 17th June 1908 in order that he might be then and there examined touching the estate and effects and dealings of the insolvents and to produce all the books of account, papers and documents in any way relating to the insolvents' dealings and transactions.

On the same day a Rule nisi was obtained by the opposing creditors calling upon Maneckji to show cause why he should

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MANECKJI  
PESTONJI  
TALATI,  
In re



1903

NAORAJI  
BORAJI  
TALATI,  
*In re*

not forthwith deliver over to the Official Assignee for the benefit of the general body of creditors the goods of the value of fifteen lacs belonging to the insolvents' firm now in his possession or subject to his control in the sale proceeds thereof

On the 15th April 1903 a Rule nisi was applied for and obtained on behalf of the said Maneckji calling upon the opposing creditors to show cause why the order for examination should not be set aside

*Set aside* in support of the Rule nisi.

Under section 4 of the Insolvency Act the Court cannot summon before it a witness who resides at a distance of more than 200 miles. It is untrue that Maneckji is in possession of goods or money amounting to 15 lacs. All the goods that were at Shanghai when the firm failed were in the possession of the banks who had advanced money on their security.

*R. Wadia* for the opposing creditor

In *In re Cawsey Ookerji* (1) it was held that the Court had power to summon before it witnesses residing at longer distances than 200 miles.

*Set aside* in reply

In *In re Cawsey Ookerji* the insolvent had filed his schedule in Bombay and had been punished under sections 50 and 57.

RUSSELL, J. —An important question arises on each of these rules which were argued before me on Wednesday last particularly having regard to the fact that it has been suggested that the proposed New Insolvency Act for Presidency Towns in India shall not be an Imperial Statute.

For if I am right in the conclusions I have arrived at it is highly desirable that the Insolvency Act for Presidency Towns should continue to be an Imperial Statute.

On the 4th March 1903, M. P. Talati was called on to show cause why he should not deliver to the Official Assignee of Bombay goods of the value of fifteen lacs belonging to the insolvents' firm now in his possession, or the sale proceeds thereof, under section 26 of the Indian Insolvency Act.

On the same day the same person was ordered to attend the Court for examination under section 36, and on 15th April 1908 he by his constituted attorney took out a rule calling on the opposing creditor to show cause why that order should not be set aside.

It appears that a firm comprising N. S. Talati, D. S. Talati and Hujarimal Multanchand filed their petition in this Court on the 29th April 1908 and on that day the usual vesting order was made. M. P. Talati was a partner in that firm and left Bombay for Shanghai in October 1906. Since then he has been carrying on the firm's business at Shanghai. M. P. Talati presented a petition to this Court to be declared insolvent but it was held that this Court had no jurisdiction to entertain it see *Re Manekji Pestonji Talati*<sup>(1)</sup>.

From the power of attorney put in at the argument before me it appears that M. P. Talati is a British subject and it is stated on the opposing creditor's affidavit and not denied that there is at Shanghai "a British Consulate (*sic*—evidently intended for 'Consular') Court" which has jurisdiction in insolvency and jurisdiction over M. P. Talati. It also appears on the rule and order of the 4th March that they were served on M. P. Talati through 'H. B. M.'s Supreme Court for China and Korea at Shanghai."

The first question I propose to discuss is whether this Court can order M. P. Talati to deliver over the goods of the firm to the Official Assignee of Bombay. I deal hereafter with the question whether he has any of such goods in his possession in fact.

The Act for Relief of Insolvent Debtors in India is an Imperial Statute, and it must be borne in mind that "the jurisdiction of such Bombay Court" (and for this purpose an Insolvency Court stands on the same footing) is partly local and partly imperial, "the imperial nature of the jurisdiction consists in this, that the powers of the bankruptcy courts to discharge debtors from their debts extend to all debts wherever contracted, that is to say, the discharge of a debtor by a court exercising bankruptcy jurisdiction in England will discharge a debt contracted by the

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debtor in one of the colonies or colonial States or in India, and the provisions as to the vesting of property in the officer appointed to collect and distribute it extend all over the Empire, so that, when a man is made bankrupt by a bankruptcy court in England, property which he has in the colonies or colonial States or in India will become distributable by the English Trustee in the bankruptcy, who can enforce his title to it" Vol II, Laws of England by Lord Halsbury, title Bankruptcy and Insolvency, p. 6 and cases there referred to

By section 7 of the Indian Insolvency Act all the property of the insolvent, whether within the limits of the Charter of the East India Company or without vests in the Official Assignee

Section 26 of the Indian Insolvency Act would appear to be supplemental to section 7, for it would be certainly anomalous for one section to vest all the insolvent's property wherever situate in the Official Assignee and the Act not to contain a section empowering the Official Assignee to get hold of such property

Now in *In re Ganeshdas Panalal*<sup>(1)</sup>, it was held that the Court for the Relief of Insolvent Debtors sitting in Bombay had jurisdiction to make an order under section 26 of the Indian Insolvency Act against a person residing outside the Bombay Presidency. The order asked for there was against a person residing at Amritsar. It will be observed that the Court expressly confined itself to the question before it, i.e., whether the property was situate in British India. But it is generally clear that Mr. Inverarity who argued the case for the successful appellants also put the case on the higher ground that the Insolvent Court would make an order as to the property of the insolvent wherever situate within the *British Dominions*. His argument was

Coming to section 26 of the Act it will appear that its wording is very general. It says 'that in case any person shall after any such insolvent shall have petitioned for his discharge be possessed of or have under his power or control any property whatsoever of such insolvent it shall be lawful for the said Court further to order such person to deliver over such property to the Assignee etc. The section thus says any person' and not a person residing within the limits of the town and island of Bombay. Where an Act of Parliament is in general terms it applies to all countries in the British Dominion where the Imperial Parliament could legislate. See

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*Callender Sykes & Co v Colonial Secretary of Lagos and Davies* where it is said (1891, A C, p 436)—“If a consideration of the scope and object of statute leads to the conclusion that the legislature intended to affect a colony, and the words used are calculated to have that effect they should be so construed.” And further at p 467 “It is a much more reasonable conclusion that the framers of the Act considered that in using general terms they were applying their law where or the Imperial Parliament had power to apply it and their Lordships hold that there is no good reason why the literal construction of the words should be cut down so as to make them inapplicable to a colony.” (1)

The Court of Appeal did not express any disagreement with this argument. From this I take it that in this respect the effect of the Indian Insolvency Act is the same as the Bankruptcy Acts in England, Scotland and Ireland under which it is clear that the moveables of the Bankrupt, whether in England or elsewhere, become vested in the trustee or the representative of the creditors. In Story on the Conflict of Laws, pp 333 and 443 (1893), I say “moveables” advisably as they are all that I am concerned with in this case. In my opinion therefore the property of the insolvents’ firm in Shanghai vested in the Official Assignee of the Insolvent Debtors Court in Bombay.

The question then arises can this Court order M. P. Talati to hand over such property to the Official Assignee in Bombay. In my opinion it can, for section 118 of the English Bankruptcy Act is a reproduction of section 71 of the Bankruptcy Act, 1869, and the Judicial Committee have held that that applies throughout the British Dominions. See *Callender Sykes & Co v Colonial Secretary of Lagos and Davies* (2).

M. P. Talati is a British subject he is subject to the Insolvent Jurisdiction of the Consular Court at Shanghai and therefore in my opinion that Court can order him if requested so to do by the Insolvent Court of Bombay to produce all the moveable property, books, papers and documents of the insolvents’ firm that may be in his possession.

In England such an order would be of course—see *In re Iery's Trusts* (3)—subject to the law applicable in Shanghai, *Ex parte Rogers* (4).

(1) (1891) 101 Com. L. R. 77 at p 73.

(2) [1891] A. C. 436.

(3) (1885) 10 C. L. D. 119 at p 121.

(4) (1891) 10 C. L. D. 663 at p 663.

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*In re*

Although on the affidavits before me it is not possible for me to hold that he has got in his possession property of the value of fifteen lacs of rupees, still from the fact of his having presented his petition in insolvency in this Court, it is impossible to suppose that he has in his possession none of the moveables, account books, etc., of the firm in which he was a partner. I allowed the rule to be amended in this respect.

The opposing creditor must therefore make an application for such a request to be sent to H. B. M.'s Supreme Court at Shanghai the terms of which must be submitted to me.

Now as to the order for the examination of the said M. P. Talati I am of opinion that the order can and should be made "Every British Court with jurisdiction in bankruptcy or insolvency, is bound to act in aid of and be auxiliary to each other in bankruptcy matters, and an order of the Court seeking aid, with a request to the Court whose aid is sought, will be sufficient authority to the latter Court to enable it to exercise in regard to the matter of the request all the jurisdiction which either of the two Courts in question could exercise in regard to similar matters" Vol. II, Laws of England, Bankruptcy and Insolvency, p. 319, citinge. 118 of Bankruptcy Act, 1883, and *Cullender Sykes & Co. v. Colonial Secretary of Lagos and Davies* (1)

I see nothing to prevent a commission being issued by this Court for the examination of M. P. Talati and H. B. M.'s Supreme Court at Shanghai making the necessary order for his examination thereunder at the request of this Court. Of course I cannot direct M. P. Talati to come to Bombay to be examined, there being no machinery for that purpose. This request to H. B. M.'s Court at Shanghai will also be submitted to me.

The costs of and incidental to the order and rules will be reserved to be dealt with by the judge who hears the case eventually.

Attorneys for M. P. Talati *Messrs Ardeshir, Hormusji, Dinshaw & Co*

Attorneys for Abechand *Mr. M. B. Chotia*

B N L

## ORIGINAL CIVIL

*Before Mr Justice Macleod*

UDERAM KESAJI (PLAINTIFF) v. HYDERALLY ABDUL  
KAYUM (DEFENDANT) \*

1908.

October 15

*Jurisdiction—Power of High Court to restrain by injunction a person  
from proceeding with a suit in the Small Cause Court*

The High Court of Bombay has inherent power to restrain by injunction a defendant in a suit filed in the High Court from proceeding in the Small Causes Court at Bombay with a suit filed by the defendant referring to the same matter to which the suit in the High Court relates or from filing further suits relating to the same subject matter pending the hearing of the High Court suit.

*Jairamdas v Zamonlal*(1) not followed

THE plaintiff brought a suit in the High Court on its original side on the 17th September 1908 against the defendant, praying that the lease dated the 18th October 1907 passed by the plaintiff in favour of the defendant be avoided and rescinded and praying that the defendant might be restrained by injunction from proceeding with two suits filed by him in the Court of Small Causes in Bombay and from filing further suits with reference to the same lease.

The said Small Cause Court suits were filed by the defendant against the plaintiff to recover from the latter the rent due under the lease up to the end of April 1908.

On the 28th September 1908 the plaintiff served a notice of motion on the defendant calling upon him to show cause why the two suits filed by him in the Small Causes Court against the plaintiff should not be stayed until the disposal of this suit.

*Jinnah* for the plaintiff in support of the notice of motion.

The High Court has power to grant the injunction asked for. See *Rash Behary Dey v. Bhowani Churn Bhose*(2) and *Mungle Chand v. Gopal Ram*(3).

\* Suit No 792 of 1908

(1) (1903) 27 Bom 257

(2) (1906) 31 Cal 97

(3) (1906) 31 Cal 101.

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*Robertson for the defendant*

The Court has no power to grant the injunction see *Jairamdas v Zarron'at*<sup>(1)</sup> The proper remedy of the plaintiff was to get the Small Causes Court suits removed to the High Court

If the Court is inclined to grant the plaintiff's application the plaintiff should be put on terms by being required to deposit in Court the amount of the defendant's claim

MACLEOD, J. —The plaintiff has filed this suit praying for a declaration that he is entitled to avoid the lease to him by the defendant of certain premises dated the 18th October 1907, as modified by a writing of the 6th December 1907. Before this suit was filed the defendant had filed two suits Nos 5503 and 12929 of 1908 in the Small Causes Court for rent due under the said lease. The plaintiff now moves for an order and injunction of this Court to restrain the defendant from proceeding with the said Small Causes Court suits and from filing further suits with reference to the said lease pending the hearing of this suit.

It cannot be denied that as the plaintiff's liability to pay rent under the lease depends on whether he will be successful in avoiding it it is highly desirable that these suits should be stayed provided the defendant is in no way prejudiced thereby. Mr Robertson, counsel for defendant, however, argued that the Court had no jurisdiction to grant the injunction.

By the Letters Patent of 1823 the Supreme Court was authorized and empowered to make such further and other interlocutory rules and orders as the justice of the proceeding might seem to require and it was further ordained that the Supreme Court should also be a Court of Equity.

By section 9 of 24 and 25 Vic c 104 it was enacted that the High Courts to be established under that Act should have and exercise all such civil jurisdiction original and appellate, and all such power and authority for and in relation to the administration of justice as Her Majesty might by Letters Patent grant

and direct and save as by such Letters Patent might be otherwise directed and subject and without prejudice to the Legislative Powers in relation to the matters aforesaid of the Governor-General of India in Council the High Courts to be established in each Presidency should have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under that Act

The amended Letters Patent of 1865 are silent on the subject of interlocutory rules and orders but under clause 19 the law or equity to be applied in each case coming before the High Court in the exercise of the ordinary original civil jurisdiction shall be the law or equity which would have been applied by the High Court if the Letters Patent had not issued. It follows, therefore, that the High Court has power to make such interlocutory rules and orders as the justice of the proceeding may require provided they are not directly prohibited by the Letters Patent or by statute

Section 53 of the Specific Relief Act (I of 1877) is as follows —

“Temporary injunctions are such as are to continue until a specified time or until the further order of the Court. They may be granted at any period of a suit, and are regulated by the Code of Civil Procedure

Sections 492 to 497 are the only sections of the Civil Procedure Code of 1882 dealing with temporary injunctions

Sections 492 and 493 enact that under certain circumstances the Court may grant temporary injunctions

I am asked to hold that the powers of the Court to grant temporary injunctions are limited to those cases in which the circumstances detailed in sections 492 and 493 exist and I have been referred to a decision of Russell, J., in *Jairamdas v Zaronlat*<sup>(1)</sup> as establishing that proposition

Mr Robertson argued that that decision was binding upon me on the doctrine of *stare decisis*

It is necessary, therefore, to consider what was the actual point decided by the learned Judge in that case, because the doctrine does not become applicable unless the point is the same

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It often happens that when a case is carefully examined it will be found that the judge has not decided what it is argued he has or that what at first sight may appear to be a principle of general application can only apply to the particular facts of the case. The injunction was refused in that case because it did not come within the terms of sections 492 and 493 of the Civil Procedure Code, but I do not find that it was laid down as an abstract proposition that owing to the provisions of those sections the Court could not grant a temporary injunction in exercise of its inherent equitable powers to do what was justice and for the advantage of the parties.

The passage from Blackstone on the rule of *stare decisis* quoted by Davar, J. in *Jamshedji C. Tarachai v. Soonabai* (1) refers more to the days when judicial decisions were considered as enunciations of what was the common law of England. The principles to guide one in applying the rule appear in more modern form in the American and English Encyclopedia of Law and Edition, Vol 26 from p 108 onward.

The passages I quote are especially valuable as the position of the Courts of the various States in America as regards their respective decisions is very much the same as that of the various High Courts in India.

"*Decisions of co-ordinate Courts* To secure uniformity of decisions a Court will as a general rule adhere to a principle laid down by a Court having co-ordinate jurisdiction until it is changed by the decision of a higher Court. The rule however is not considered absolutely binding but may be departed from in the discretion of the Court. So a Court will not follow the decisions of a co-ordinate Court where they are evidently made through mistake or are so clearly erroneous that the error is undoubted."

"*Single decisions* Distinction has also been drawn in the application of the doctrine of *stare decisis* where only one decision is relied upon as establishing the doctrine. For a variety of reasons a series of decisions will be given more

weight than a single decision. There is less likelihood of error ; any previous decision or statutes overlooked in the one may be considered in subsequent cases "

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" Also the opinion and decision of a Court must be read and examined as a whole in the light of the facts upon which it is based, and not applied by picking out particular parts or sentences. The facts are the foundation of the entire structure, which cannot with safety be used without reference to the facts. The decision is only an authority for what it actually decides and cannot be quoted for a proposition which may seem logically to follow from it."

The last passage is especially pertinent to the present case, as it is only by inference that it can be said that the learned Judge laid down the abstract proposition above referred to. The decision by itself amounts to this, that the injunction was refused in that particular case because it did not come within the terms of sections 492 and 493 of the Civil Procedure Code.

But the question whether the powers of the High Court are limited by the provisions of the Civil Procedure Code is dealt with exhaustively by Woodroffe and Mookerjee, JJ., in *Hukum Chand Boid v. Kamalanand Singh*(1).

At page 931 Woodroffe, J, says —

" The Code does not as I have already had occasion to hold, *Panchanon Singh v. Kunulota Dharmoni*(2) affect the power and duty of the Court, in cases where no specific rule exists, to act according to equity justice and good conscience, though in the exercise of such power it must be careful to see that its decision is based on sound general principles and is not in conflict with them or the intentions of the Legislature. The Court has, therefore, in many cases, where the circumstances require it, acted upon the assumption of the possession of an inherent power to act *ex debito justitiae* and to do that real and substantial justice for the administration, for which it alone exists. It has thus been held that, although the Code contains no express provision on the matters hereinafter mentioned, the Court has an inherent power *ex debito justitiae* to consolidate. These instances (and there are others) are sufficient to show, firstly that the Code is not exhaustive and, secondly, that in matters with which it does not deal, the Court will exercise an inherent jurisdiction to do that justice between the parties "

(1) (1905) 33 Cal. 927.

(2) (1905) 3 C. L. J. 20.

1898.

At p. 940, *Morley v. J.*, says —

UPON  
HEARD  
HONORABLY,

"I entirely repudiate the view that the powers are not to be exercised by the provisions of the Code, and that we have no power to make a permanent order, though I may be satisfied that it is in the interest of justice, unless some section of the Code can be cited out as authority for it. . . . Such a theory, moreover, is entirely inconsistent with various decisions of the Judicial Committee and of the different High Courts of this country, among which I need only mention those in the cases of *Raja Kirpal v. Muzumdar* (*Rep. Kirpal*) (1887), *Sardar and Bhai v. The Collector and Jais of the High Court of Bombay* (1887) &

Section 55 of the Specific Relief Act merely states that temporary injunctions are regulated by the Code of Civil Procedure, it does not enact that the Court shall grant only such temporary injunctions as are provided for in the Code. So that Mr. Phipson's argument could only prevail if the Code had provided that the Court should only grant temporary injunctions under the particular circumstances detailed therein and no others. That this is not the effect of sections 492 to 497 is demonstrated in *Raja Kirpal v. Muzumdar* (*Rep. Kirpal*) (1887) and *Muzumdar v. Gopal Rao* (1890).

In my opinion I am at liberty to follow those decisions.

I therefore grant the injunction asked for but as the defendant might be prejudiced in the event of the plaintiff failing in this suit I direct the expenses to be paid by counsel during the argument that plaintiff do bring into the Court within one week Rs. 1,450 the total of the amounts paid for in the Small Cause Court and the

Costs of the motion to be costs in the cause.

Attorneys for plaintiff: *Messrs. Jaisingh, Mehta and Son*

Attorneys for defendant: *Messrs. Puri, Puri and Kaur*

R. N. L.

(1898) L. R. 111, 1, 13

(1898) L. R. 131, 1, 17

(1898) 31 Cal. 107

(1898) 31 Cal. 111

## ORIGINAL CIVIL

*Before Chief Justice Sprott and Mr Justice Batchelor*

L. F. BRAHIM (APPELLANT AND PLAINTIFF) v. HAJI JAN MAHOMED HAJI MAHOMED (RESPONDENT AND DEFENDANT)\*

1908

November 16.

*Under Pro-Cedure Code (Act XIV of 1882) sections 102 103 117—Suit dismissed owing to absence of Counsel—Plaintiff present with his witnesses—Ru'ed that the costs of the Counsel—Junior Counsel should return brief of other Counsel at once to be presented—Practice*

Sections 102 and 103 of the Civil Procedure Code do not apply when the plaintiff is present in Court. Notwithstanding the non-appearance of the plaintiff's Counsel the Court can under section 117 of the Code ask the plaintiff to attend to the suit and can examine his witnesses or suggest that he instruct some other Counsel to examine the witnesses.

The rule of allowing the costs of two Counsel on each side in litigation was laid down by the Judges in order to obviate the dislocation of the business which might result from cases being called on at the same time in two or more Courts in which the same Counsel was engaged. This rule has always been supplemented by the unwritten rule of the Bar that one or other Counsel must return his brief in good time if there is a chance of neither being able to attend when the case is called on and that in case of dispute it is the duty of the junior to return the brief or to make arrangements for some other Counsel to attend until he can come in.

There were two appeals from the orders of Mr Justice Russell made on the 24th day of August 1903, the first refusing the application of the plaintiff to have the suit restored to the board and the second against the decree dismissing the suit with costs.

The plaintiff filed this suit to recover certain monies from the defendant in respect of certain Hoondies drawn by the plaintiff in favour of the defendant. The suit was called on before Mr Justice Russell, J., on the 17th August 1903, at a time when neither the plaintiff's Counsel could attend the Court. The defendant appeared and then another Counsel was instructed on behalf of the plaintiff to apply for a postponement. This was refused and the suit was dismissed with costs. An application was made under section 103 of the Civil Procedure Code for the restoration of the suit but this was refused with costs.

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At p 940, Mookerjee, J., says —

‘ I entirely repudiate the theory that our powers are rigidly circumscribed by the provisions of the Code, and that we have no power to make a particular order, though it may be absolutely essential in the interest of justice, unless some section of the Code can be pointed out as a direct authority for it. Such a theory, moreover, is entirely inconsistent with various decisions of the Judicial Committee and of the different High Courts of this country, among which I need only mention those in the cases of *Ram Kirpal v Missumat Rup Kumar* (1) . . . *Surendra atk Banerjee v The Chief Justice and Judges of the High Court of Bengal* (2) &c

Section 53 of the Specific Relief Act merely states that temporary injunctions are regulated by the Code of Civil Procedure, it does not enact that the Court shall grant only such temporary injunctions as are provided for in the Code. So that Mr Robertson's argument could only prevail if the Code had prescribed that the Courts should only grant temporary injunctions under the particular circumstances detailed therein and no others. That this is not the effect of sections 492 to 497 has been decided in *Rash Behary Dey v Bhowani Churn Bhose* (3) and *Mungle Chand v Gopal Ram* (4).

In my opinion I am at liberty to follow those decisions.

I therefore grant the injunction asked for but as the defendant might be prejudiced in the event of the plaintiff failing in this suit I direct as suggested by counsel during the argument that plaintiff do bring into this Court within one week Rs 1,150 the total of the amounts sued for in the Small Causes Court suits.

Costs of the motion to be costs in the cause.

Attorneys for plaintiff *Messrs Jehangir, Mehta and Sonji*

Attorneys for defendant *Messrs Pestonji, Rustum and Kola*

D N L

(1) (1883) L R 11 I. A 37

(2) (1883) L R 10 I A 171

(3) (1906) 34 Cal 97.

(4) (1906) 34 Cal 101

## ORIGINAL CIVIL.

*Before Chief Justice Scott and Mr Justice Batchelor*

ESMAIL EBRAHIM (APPELLANT AND PLAINTIFF) v HAJI JAN  
MAHOMED HAJI MAHOMED (RESPONDENT AND DEFENDANT)\*

1908

November 16.

*Civil Procedure Code (Act XIV of 1857), sections 107, 103, 117—Suit dismissed owing to absence of Counsel—Plaintiff present with his witnesses—Rule allowing costs of two Counsel—Junior Counsel should return brief if neither Counsel able to be present—Practice*

Sections 103 and 107 of the Civil Procedure Code do not apply when the plaintiff is present in Court. Notwithstanding the non appearance of the plaintiff's Counsel the Court can under section 117 of the Code ask the plaintiff questions relating to the suit and can examine his witnesses or suggest that he should instruct some other Counsel to examine the witnesses.

The rule of allowing the costs of two Counsel on each side in taxation was introduced by the Judges in order to obviate the dislocation of the business which might result from cases being called on at the same time in two or more Courts in which the same Counsel was engaged. This rule has always been supplemented by the unwritten rule of the Bar that one or other Counsel must return his brief in good time if there is a chance of neither being able to attend when the case is called on and that in case of dispute it is the duty of the junior to return the brief or to make arrangements for some other Counsel to attend until he can come in.

THESE were two appeals from the orders of Mr Justice Russell dated the 24th day of August 1903, the first refusing the application of the plaintiff to have the suit restored to the board and the second against the decree dismissing the suit with costs.

The plaintiff filed this suit to recover certain monies from the defendant in respect of certain Hoondies drawn by the plaintiff in favour of the defendant. The suit was called on before Russell, J., on the 17th August 1903, at a time when neither of the plaintiff's Counsel could attend the Court. The defendant raised issues and then another Counsel was instructed on behalf of the plaintiff to apply for a postponement. This was refused and the suit was dismissed with costs. An application was made under section 103 of the Civil Procedure Code for the restoration of the suit but this was refused with costs.

\* Appeals Nos. 13 and 14 of 1903. Suit No. 256 of 1907.

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The plaintiff thereupon filed these two appeals.

*Jinnah and Setalvad* for appellant

The suit was called on very unexpectedly on August 17th. On that day there were two long causes and one commercial cause down for trial before this suit. These earlier suits suddenly collapsed and this suit was called on at 12 15 o'clock. At that moment both the plaintiff's Counsel were engaged addressing other Courts. The plaintiff was physically present in Court. The question then arises whether where a plaintiff has instructed Attorneys and has signed a warrant in their favour authorising them to appear and conduct the case on his behalf and his Attorneys have instructed Counsel and have duly briefed them the mere fact of the plaintiff's physical presence in Court can be said to be an appearance under section 102. See *Gopals Row v. Maria Susaya Pillai*<sup>(1)</sup>, Sir Arnold White's judgment. According to that case the mere fact of the party's physical appearance in Court does not mean that he appeared under section 102. The words 'appear in person' have a well defined meaning, viz., when a party appears to conduct his own case without any Attorneys or Counsel. The fact that another Counsel was instructed to apply on behalf of the plaintiff for a postponement does not mean that there was any appearance on behalf of the plaintiff. See also *Shibendra Narain Chowdhury v. Kundo Roy Dass*<sup>(2)</sup>, *Manilal Dhunji v. Gulam Hussain Fazeer*<sup>(3)</sup>.

The defendant brought into Court Rs. 207-<sup>00</sup>/<sub>100</sub>. The Court ought to have in any event passed a decree for this amount in favour of the plaintiff under section 102 which says that if the defendant appears and the plaintiff does not appear the Court shall dismiss the suit unless the defendant admits the claim or part thereof in which case the Court shall pass a decree against the defendant upon such admission.

*Lowndes and Strangman*, Advocate General, for the respondent

SCOTT, C. J.—In this case the plaintiff sued the defendant for eight thousand three hundred rupees. The defendant put in a

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written statement admitting the claim to the extent of Rs. 207 only which he brought into Court. The suit was called on on the 17th August and the plaintiff was present in Court with his Attorneys' clerk and his witnesses ready to proceed with the hearing of the suit, but the two Counsel whom he had instructed were both absent. The defendant's Counsel appeared and raised issues and another Counsel was instructed by the plaintiff's Attorneys' clerk to apply for an adjournment which, however, was not granted. The Court after waiting for some time for the plaintiff's regularly instructed Counsel to appear, on their non-appearance, dismissed the suit with costs.

It is clear that the order of dismissal cannot stand because the plaintiff was entitled to a decree for the sum of Rs. 207 brought into Court, and as it is necessary for us to pass a decree for that amount at least, we think it is open for us to reconsider the whole case.

The plaintiff has filed two appeals, the first an appeal against the order which was made under section 103 of the Civil Procedure Code and the second an appeal against the decree dismissing his suit.

In our view sections 102 and 103 of the Code do not apply because the plaintiff was present in Court. He did appear and he was ready to go on with his suit as for as his own evidence and that of his witnesses was concerned, and the Judge notwithstanding the non-appearance of the plaintiff's Counsel could under section 117 of the Code have asked the plaintiff questions relating to the suit and could have examined his witnesses or suggested that he should instruct some other Counsel to examine the witnesses. We do not think that it can be reasonably contended that the plaintiff did not appear, and if he did appear then there is no case for the application of sections 102 and 103.

We think, however, that having the case now before us in consequence of the Judge's error in not passing a decree for the plaintiff for the sum of Rs. 207 brought into Court, we ought in the interests of justice to set aside the decree and direct a new trial.



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MAHOMED.

In making this order, however, it is necessary that we should protect the defendant from loss in consequence of the expenses that he has been put to. The plaintiff must, therefore, pay the costs of the day incurred on the 17th August, the costs of the order passed on the application under section 103, the costs of and incidental to the drawing up of the decree dismissing the suit and the costs of both these appeals.

The result will be heavy costs upon the plaintiff owing to the neglect of his Counsel. In this connection it seems necessary to remind the Bar that the rule of allowing the costs of two Counsel on each side in taxation was introduced by the Judges shortly after the establishment of the High Court when several Divisional Courts sat simultaneously on the Original Side. The rule was introduced in order to obviate the dislocation of the business which might result from cases being called on at the same time in two or more Courts in which the same Counsel was engaged. This rule has always been supplemented by the unwritten rule of the Bar that one or other Counsel must return his brief in good time if there is a chance of neither being able to attend when the case is called on, and that in case of dispute it is the duty of the junior to return the brief or to make arrangements for some other Counsel to attend till he can come in. If members of the Bar disregard their obligations in such cases the justification for the two Counsel rule will cease to exist and the rules for taxation between party and party will have to be revised by the Judges.

The payment of the costs, which we have ordered, will be a condition precedent to the hearing of the suit, the defendant undertaking to have his costs taxed and the allocatur served within three weeks.

Attorneys for the appellant *Messrs Hadia, Gandhi & Co*

Attorneys for the respondents *Messrs Payne & Co*

## APPELLATE CIVIL.

—\* —\* —\*  
*Before Sir Basil Scott, Chief Justice, and Mr Justice Bachelior*

CHHAGANLAL KISHOREDAS (ORIGINAL PLAINTIFF), APPELLANT, v  
 BAI HAPKHA (ORIGINAL DEFENDANT No 2) RESPONDENT \*

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 March 23

*Civil Procedure Code (Act XIV of 1852), sec 13—Res judicata—Plea of res judicata can prevail even where its effect is to sanction what is illegal—Bhāgdār and Narwādār Tenures Act (Bombay Act V of 1862), sec 3 †*

A plea of estoppel by *res judicata* can prevail even where the result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by statute

SECOND appeal from the decision of Chimanlal Lalubhai, First Class Subordinate Judge with appellate powers, at Ahmedabad, confirming the decree passed by B G Desai, Subordinate Judge at Kaira

Suit to recover rent

The property, with respect to which the suit was brought, belonged to Govind and Gokul. It formed a portion of a bhāg or share; any alienation, assignment, &c, of which was prohibited by the Bhāgdār and Narwādār Tenures Act (Bombay Act V of 1862), sec 3

The lands in dispute which formed an unrecognised sub-division of a bhāg, were mortgaged by Govind and Gokul to Chhaganlal Kishoredas (plaintiff) with possession on the 3rd February 1893. On the same day Govind passed a lease to the plaintiff for a term of five years. There were many other subsequent leases, the last of which was passed by Govind for a period of one year on the 10th September 1902. Even after the

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\* Second Appeal No 244 of 1900

† The section runs as follows —

3 It shall not be lawful to alienate, assign, mortgage or otherwise charge or incumber any portion of any bhāg or share in any Bhāgdār or Narwādār village other than a recognised sub-division of such bhāg or share, or to alienate, assign, mortgage or otherwise charge or incumber any homestead building-site (gabbān) or premises, appurtenant or appendant to any such bhāg or share, or recognised sub-division, appurtenant or appendant thereto, apart or separately from any such bhāg or share or recognised sub-division thereof

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expiry of this period, Govind remained in possession of the lands till his death which took place in June 1905. After his death, his widow Bai Harkha (defendant 2) cultivated the lands on behalf of herself and her minor son Ambhalal (defendant 1).

During Govind's life-time, he was sued by the plaintiff for rent for the years 1902-03 and 1903-04 and an *ex parte* decree was passed against him.

The plaintiffs now sued the defendants to recover from them rent for the years 1904-05 and 1905-06.

Defendants contended (*inter alia*) that the land in suit was Narwa land, and that the sale or mortgage thereof in favour of any person other than a Narwádár was invalid and that it could not be dismembered, and that as the plaintiff could not get possession of the land under the Bhágdári Act he could not claim the rent thereof.

The Court of first instance held that the mortgage in favour of the plaintiff was illegal, and the lease of the land on the basis of the said mortgage was invalid, and that the plaintiff could not recover damages in lieu of rent.

On appeal, the only issue raised in the lower appellate Court was "Are the defendants-respondents estopped from denying the title of the plaintiff appellant and are they liable for the amount claimed by the plaintiff-appellant?" This issue was found in the negative.

The plaintiff appealed to the High Court.

*H C Coyaji* (with *L A Shah*), for the appellant.—We concede that the mortgage in our favour is void under the Bhagdári Act, 1862, but the lease which has been passed to us is not on that account void. The lessee Govind paid to us rent for a number of years, and even allowed an *ex parte* decree for rent to be passed against him. Refers to *Rungo Lall v. Abdool Gifford*<sup>(1)</sup>, *Tenkaleri Narayan Pai v. Krishnaji Arjun*<sup>(2)</sup>, *Balaji v. Ramchandra*<sup>(3)</sup>, *Patel Atalhai v. Hargovan*<sup>(4)</sup>, *Morton v. Woods*<sup>(5)</sup>, *Sethurama Selliapp*

(1) (1878) 4 Cal. 314.

(2) (1875) 8 Bom. 160.

(3) (1907) 27 Bom. 762.

(4) (1894) 19 Bom. 133.

(5) (1879) L. R. 4 Q. B. 293.

v *Chickaya Hegade*<sup>(1)</sup> The decree in the previous suit operates as *res judicata* *Dwarka Das v Akhay Singh*<sup>(2)</sup>, *Jamadar Singh v Serazudin Ahmad Chaudhary*<sup>(3)</sup>

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*Ratanlal Ranchhodas* for the respondent —We submit that not only is the mortgage void under the Bhagdāri Act, 1862, but the lease also shares the same character, it being an alienation of an unrecognised division of a bhāg under section 3 of the Act.

The decree against Govind being *ex parte* cannot operate as *res judicata* *Modhnudun Shaha Mundul v Brac*<sup>(4)</sup>. Further, where the effect of *res judicata* is to validate what has been specifically prohibited by statute the plea should not be allowed to prevail, otherwise, it would be open to the parties to effect transactions in an indirect way, which they cannot do in face of the statute

SCOTT, C J —On the 3rd of February 1903 a possessory mortgage of certain Bhāgdāri land was executed by Govind Khodabhai and his brother in favour of the plaintiff. On the same day Govind passed a tenancy agreement to the plaintiff whereby he took the land as lessee for five years. Further agreements of a similar nature were subsequently executed by Govind in the plaintiff's favour the last being of the 18th September 1902 for one year. After the expiry of that year Govind continued in possession of the land until his death in June 1905. On his death his widow the second defendant cultivated the land on behalf of herself and the first defendant her minor son. This suit has been brought by the plaintiff to recover the rent of the land for two years namely 1904-5 and 1905-6. No objection has been taken that rent accruing due in the life time of Govind is not claimable against the defendants personally in this suit. The plaintiff comes here in special appeal having failed in both the lower Courts.

The land the subject of the mortgage and of the tenancy agreements is Bhāgdāri land, part of a Narwa, but not a recognised sub-division of a share or Bhāg. The mortgage is therefore unlaw-

(1) (1902) 25 Mad. 507

(2) (1908) 20 All. 470

(3) (190 ) 35 Cal. 277.

(4) (1887) 16 Cal. 200.

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increase the amount of compensation to be paid for the land, under section 40 (2). It seems not. The right to quarry was in the owner of Nowroji Hill and till within the last 10 years quarrying had been carried on quite close to the plots in question. We think the right was not totally destroyed by the letting of the plots for building purposes, but was simply kept in abeyance during the occupation of the land by the tenants.

The owner of the Hill was, as to say, possessed of the freehold. He owned the soil and had the right to quarry, but that right he could not exercise so long as his tenants occupied the land. That right would revive and he would become repossessed of it at any time he bought out the tenants.

The claimant was the only person to appear before the Tribunal claiming full compensation for all interests. The tenants did not appear, and did not make any claim.

Under these circumstances, if this view was correct, it would follow that no new interest was created after the date of Notification, nor was any interest that previously existed enlarged after that date. The interest in the right to quarry was there, it was in abeyance for a time. The tenants, who had taken the land on lease for building purposes, had no right to quarry; they were entitled to the use of the surface land only. When, therefore, the landlord bought out the tenants' building rights, he became repossessed of what he originally had as the owner of the soil in the seven plots. As to plots 505 and 510 there was no dispute and claimant was admittedly the owner of all interests in them.

The case presents another difficulty, for, if each plot is taken separately it is so very small in size that it would not be possible to carry on quarrying operations with safety. In that case we think it fair that something extra should be allowed for the chance of acquiring the other plots so as to get a quarry area.

Under the Land Acquisition Act, section 23, we have to ascertain the market value of the land. To do this, it has been held by my predecessor in office that it was not necessary to value the interests of the landlord and the tenant separately, but all interests should be valued together. In reference No. 22 of 1905, Mr Macleod said that it was not intended that the Collector should split up interests and value them separately and independently, as for instance to treat a landlord's interests and a tenant's interests in the same for as distinct things to be valued apart from each other.

The treatment of the different References as one Reference strengthened claimant's contention demanding compensation for his quarry rights. The question for decision is an important and difficult one and I have consequently expressed my willingness to grant a certificate of Appeal to the High Court. We are inclined however to hold and we find that claimant has not acquired any new or enlarged interest in terms of section 40 (2) so as to increase the amount of compensation to be paid for the land.

The Tribunal further worked out alternatively compensation on a rental basis and in doing so, they remarked as follows —

“If the method adopted by us for the above valuation is not accepted by the High Court, the other method to follow would be to determine what a prudent purchaser would pay on valuing each plot separately and allowing some extra value in consideration of the chance of acquiring the adjoining plots so as in the end to get a large quarriable area. In that event we would adopt the valuation made by the collector, but with this modification that instead of allowing 14½ years' purchase as he has done we would increase the number of years purchase to 18½.”

The Trustees appealed to the High Court

*Lowndes and Jardine* (with Messrs *Crawford, Brown and Company*) for the appellants. — It is not competent to the claimant to acquire a new interest in the plots after the date of the Notification issued under the Land Acquisition Act (I of 1894). The claimant Jalbhoy bought up the tenant's rights in seven plots after the date of the Collector's award. But as soon as the Collector's award was made, the land vested absolutely in His Majesty under section 50 of the City of Bombay Improvement Act, 1899. The tenants had no other interest left to them except the right to receive compensation awarded, and Jalbhoy cannot claim to have got anything more than such right by reason of the said purchase.

The Tribunal of Appeal erred in allowing the cases to be consolidated before them. The consolidation cannot be allowed where its effect is to enable a party to put forth a claim which he could not make if the consolidation were not allowed.

Further, the Tribunal have erred in valuing the land here on the basis of an unencumbered free-hold and then proceeding to divide the amount into different interests. Property to be acquired must be valued *res sic stantibus* at the date of declaration. Land in the abstract can have no market value. There can be no such thing as the market value of land in the abstract separate from the interests therein. What one buys in the market is the interest in the land. The market value of land must mean the aggregate value of various interests in it. The words used in a conveyance of land are always “the right, title and interest of X Y Z.”

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The difficulty of attempting to value land in the abstract will be apparent from the following instances —

(1) It has been held by the Privy Council that the Collector's award is merely an offer made on behalf of Government. If the Collector is to value in the abstract how can he make an offer to various persons having an interest in the land? In *In re Esufali Salebhai* (1) Macleod, J., has held that the term "claimant" in the Land Acquisition Act, 1894, means the aggregate body of claimants and that the offer has to be made to the claimants as a body. I submit that this is not a right interpretation.

(2) The land is acquired free from all incumbrance, *e.g.* easements. How can you value land in the abstract free from easements? The easements might be more valuable than the land and you must value them separately.

(3) In cases of Toka tenure, the interest of the Toka tenant has a market value and is sold every day. Free hold is never sold. It was held that the Government was not a party interested in the valuation of Toka tenure land under the Land Acquisition Act. The City of Bombay Improvement Act was, therefore, amended subsequently so as to make the Government a party interested.

(4) In lands held on Savad tenure, there is a chance of Government resuming the land. How can you value such land as unencumbered free-hold? If you do how can you apportion the interest of Government, which is merely a chance of Government resuming the land?

I submit that even under the Land Acquisition Act the separate interests in land and not land in the abstract are to be valued. Section 9 of the Land Acquisition Act speaks of claims to compensation for all interests in the land. Section 11 also refers to interests in the lands, sections 19, 20, 21 and 23 contemplate separate awards of compensation in case of persons holding separate interests in the lands. The whole scheme of the Land Acquisition Act is to compensate individuals for their separate interests. The principles of English Law, therefore apply here.

according to which the value to the owner and not to the acquiring body is to be determined and awarded *See Stebbing v Metropolitan Board of Works* <sup>(1)</sup>, *Penny v Penny* <sup>(2)</sup>, *Isaiah v Mayor, Aldermen, and Commons of the City of London* <sup>(3)</sup>, *Cripps on compensation* (4th Edn), p 109

The appellants further submitted that owners of separate properties cannot combine so as to secure a larger value for their combined properties. Value of a large area made up of irregular plots if sold as one plot would be much larger than the aggregate values of the separate irregular plots. Such valuation is not allowed, for by so valuing you would be giving each separate owner more than he is entitled to by way of compensation for his interest. *See Mayor of Tynemouth and Dike of Northumberland* <sup>(4)</sup>

You may give something more for the possibility of the claimant acquiring the adjacent lands and thus increasing the value of his interest. But the possibility must not be very remote. The tenants in the present case are Fazandar tenants and have a permanent interest in the land. Jalbhoy is the fazandar and has the right to receive the ground rent and nothing else. The tenants are the owners of the land subject to the payment of ground rent, there being no power of re entry in Jalbhoy. The tenants and Jalbhoy, therefore, cannot combine.

Further, it is not the tenants who come and ask to combine but a person who has bought up the tenants' rights after the notification. No difference exists between an outsider and a Fazandar buying up the tenant's rights. If the tenants cannot claim to combine, how can a person who has bought their rights do so?

As regards the principle of valuation, the observations in *Government of Bombay v Merwanji Muncherji Caria* <sup>(1)</sup> and *Collector of Belgaum v Batmrao* <sup>(2)</sup> are against me.

The true principle is to value the interest of each holder of a tenure and give him a sum equivalent to the purchase-money of

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(1) (1870) 1 R G Q 137 at p 41

(2) (1903) 19 T. L. R. 630

(3) (1867) L. R. 5 Eq. 237 at p 230

(4) (1908) 10 Bom. L. R. 707 at p 219

(5) (1906) 11 T. L. R. 116 at pp 603-604

(6) (1906) 10 Bom. L. R. 60



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such interest *Dinendra Narain Poy v. Titiram Mukerjee*<sup>(1)</sup>, *Field v. Secretary of State for India*<sup>(2)</sup>. These cases were decided under the Land Acquisition Act. But the present case falls under section 49 (2) of the City of Bombay Improvement Act. It shows pointedly that you must value the separate interests separately.

Jalbhoy is not entitled to valuation on the quarrying basis. Originally, there were two alternatives before the owner of these plots: (1) Hanging on to the land without the prospect of any return in the immediate future on the chance of quarrying it later on when the same could be profitable, or (2) letting out the land immediately for building purposes and getting an immediate return for the same. The owner here chose the second alternative and got a large return during these years. He cannot now claim the profits of quarrying.

Strangman (Advocate General) with *Intervently* (instructed by *Pestonji, Rustai and Kola*) for the respondent.—The question as to how the value is to be assessed resolves itself into two other questions: (1) Is it land or various interests in land which are to be valued, and (2) Is the Collector to be allowed to prejudice the owner by splitting up the land as he thinks fit and making separate cases and separate awards for the parcels into which the land is split up. I submit, the answer to the first question is land, and the second question must be answered in the negative. As to the first question, I rely on the plain meaning of sections 3a, 4, 6, 9, 11, 18, 20, 21, 22, 29 and 30 of the Land Acquisition Act, and on the case of *Collector of Belgaon v. Bhimrao*<sup>(3)</sup>. If the argument of the appellants is to be given effect to then you must substitute "market value of the separate interest in the land," for the phrase "market value of land" in section 23 of the Land Acquisition Act, 1894.

In the present case, Jalbhoy was the common owner of the land and the quarry. It is quite immaterial to what use the owner may have put his land. If you treat the interests as having

(1) (1903) 30 Cal 501

(2) (1891) 31 Cal 60

(3) (1898) 10 Bom LR 637

combined, then why not assume a combination for a common owner. The claimant was at the date of the declaration entitled to the value of the land on the quarrying basis minus what it would cost him to buy out the tenants. The market value is what a purchaser would give for all the interests combined.

*Lowndes* in reply. — Once you assume combination there is no obstacle to valuing the land on a quarryable basis. But the combination must either rest on fact or be assumed in law. There is none in fact, under what law then can it be assumed? The whole scheme of the Land Acquisition Act is compensation, therefore the enquiry must be what is the man losing? The Court cannot undertake to "compensate" for land in the abstract. The English practice is to compensate for separate interests. See Lands Clauses Consolidation Act, 1845 (8 and 9 Vict., c. 18), sections 9, 12, 15, 16, 18, Housing of the Working Classes Act (33 and 34 Vic., c. 70), section 21 (1).

BATCHELOR, J. — This is an appeal from a decision of the Tribunal of Appeal appointed under section 48 of the City of Bombay Improvement Act, 1898, and has reference to the amount of compensation to be awarded to the claimant, Jalbhoy Ardesir Sett, in respect of nine parcels of land which have been acquired by Government for the Improvement Trustees under the Improvement Act, 1898. The compensation awarded by the Special Collector was Rs. 11,803, and on appeal to the Tribunal this sum was increased to Rs. 42,361 with interest at 6 per cent on Rs. 30,560. Against this award the Improvement Trustees bring the present appeal contending that the Tribunal has applied wrong principles in assessing the compensation and that an excessive sum has consequently been allowed.

The facts are not in dispute, and for present purposes may be shortly stated as follows. In December 1898 the nine parcels were notified in connection with a scheme under section 27 of the Improvement Act, and at that time Jalbhoy was in unencumbered ownership of only one of the parcels No. 505, the others being let on leases. The land is such that the whole plot, consisting of the nine parcels, forms in itself a valuable quarry, but it is not profitable to quarry any small area such as a single parcel.

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Between the notification and the acquisition Jalbhoy bought out the interest of the tenant of parcel No 510. In acquiring the land the Special Collector dealt separately with parcels 505 and 510, to which apparently a part of No 512 was also added, and refused Jalbhoy's claim to receive compensation on a quarrying basis. Jalbhoy appealed to the Tribunal, his general claim for quarrying value being included in the reference. As to the remaining parcels, the Collector made separate awards, valuing the house holders' interests on a rental basis, and assessing the interest of Jalbhoy as Fazandar at 25 years' purchase of the rents. None of the tenants claimed a compensation reference to the Tribunal, but Jalbhoy did claim this reference in each case and in each case he made it without prejudice to his general claim for quarrying value as embodied in his appeal regarding parcels 505, 510 and 512. After the Collector had made his award, and before the references to the Tribunal came on for hearing, Jalbhoy bought out all the remaining tenants. When the references were taken up by the Tribunal, Jalbhoy applied that they should be consolidated and that his claim for compensation on a quarrying basis should be allowed. Mr Lowndes's first objection to the decision under appeal is that the Tribunal was wrong in allowing the references to be consolidated with the result that Jalbhoy was thus permitted to advance a claim—namely, the claim to the quarrying value—which otherwise he would not have been able to make. But in my opinion the consolidation had not this effect, and was rightly allowed. Mr Lowndes concedes that Jalbhoy could not be prejudiced by any parcelling out of the land which the Collector might choose to make, and, that being so, the objection seems to me to fail. For it was not by reason of the consolidation of references that Jalbhoy was enabled to put forward what may be called the quarrying claim; that claim was already before the Collector and the Tribunal, and, whether good or bad, had to be decided on quite other grounds than the arbitrary division of the land made by the Collector. Moreover it must be remembered that Jalbhoy as Fazandar owner of some of the plots and as lessor of the others with the prior right of buying out the lessee had an interest in the whole area acquired.

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To pass now to the main argument which has been addressed to us it turns upon the meaning of the words "the market value of the land" in section 23 of the Land Acquisition Act. The Advocate General has contended that the compensation to be awarded must be ascertained by reference to the value of the land itself considered as he put it, as unencumbered freehold, that is, on the assumption that all interests combine to sell, Mr Lowndes on the other hand has urged that the true meaning of the Act is that compensation should be awarded by the valuation of the separate interests existing in the land. It appears to have been assumed at the bar that the choice between these alternative constructions must determine the result, but for my own part I am not clear that such an assumption is well founded. However that may be, I think that the point in controversy is, so far as this Court is concerned concluded by the case of *Collector of Belgaon v. Blimrao*<sup>(1)</sup>. While that case stands, I can see no room for the appellants' present contention, and I did not understand Mr. Lowndes to suggest that the contention could be allowed under the Land Acquisition Act so long as the case retains its authority. The decision, to which I was a party is a decision of this Appeal Court and has the high authority of Jenkins C J, who in delivering the judgment laid down that for the purposes of ascertaining the market value of land under section 23 of the Land Acquisition Act "the Court must proceed upon the assumption that it is the particular piece of land in question that has to be valued including all interests in it. That, as I understand it, was said in general terms upon the construction of the Act, and formed the *ratio decidendi*. So far as the Land Acquisition Act is concerned, I think the ruling is decisive, and it is of course binding upon us now. The only ground upon which Mr Lowndes sought to avoid this decision was, if I followed his argument correctly that here the land was acquired not under the Land Acquisition Act, but under the Bombay City Improvement Act. The distinction certainly exists, but in my opinion it is not material. For the Improvement Act incorporates the relevant provisions of the Land Acquisition Act including section 23 and I can find no good reason for supposing that

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the Improvement Act intends, or operates, to effect a fundamental change in the methods of the Land Acquisition Act. No such far reaching effect ought, I think, to be given to section 49 (2) of the Improvement Act, which merely reproduces section 21 (b) of the English statute, the Housing of the Working Classes Act, 1890, and which may receive ample meaning without recourse to the unlikely hypothesis that so important a change in the Acquisition Act was intended to be made by way of indirect and somewhat far-fetched inference. In my opinion, therefore, it would be enough to say that the decision in the *Collector of Belgaum's case*<sup>(1)</sup> is fatal to the contention that the land here should be valued on the footing of assessing the separate interests.

But as I am anxious to avoid any appearance of trusting unceremoniously the careful and elaborate argument we have had from Mr Lowndes, I will notice briefly the main points which he has discussed. His chief reliance was placed upon certain particular sections of the Land Acquisition Act such as sections 3 (g) (iv), 9 (3) and 31 (1) (2) (3) and (4) as showing that the word "land" was used in the Act as equivalent to "interest in land". The Advocate General, on the other hand, has pointed to a number of other sections where the word "land" appears to denote the physical object. It would be tedious to analyse all these sections individually, nor do I think it necessary to do so. There can be no doubt that the word "compensation" is occasionally used to mean the particular sum awarded for the acquisition of a particular interest, but that is quite consistent with the position taken by the Advocate General. Reading the Act as a whole, I can come to no other conclusion than that it contemplates the award of compensation in this way: first you ascertain the market value of the land on the footing that all separate interests combine to sell, and then you apportion or distribute that sum among the various persons found to be interested. Sections 3, 11, 18, 19, 20 and especially sections 29 and 30 are to my mind decisive upon the point. Section 31 (3) which Mr Lowndes claims in his favour appears to me to tell the other way, for, though the subsection is not perhaps worded with

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perfect accuracy, we have the antithesis marked between land and an interest in land. That distinction is, as I understand it, preserved throughout the Act, where "land" is always used to denote the physical object, which is after all the thing that has to be acquired. Provision is made for compensation to all persons interested, but claims on this head are, I think, to be adjusted in the apportionment prescribed under sections 29 and 30, and do not fall to be considered till after the Court has determined the market value of the land under section 23 (1).

Then Mr Lowndes urged that the theory which I am endeavouring to justify would lead to unwelcome results in its practical application, and he gave us two or three instances of such difficulty. I have considered those instances to the best of my ability, but am not prepared to concede that the difficulties suggested are inevitable under my view of the Act, and in any case, if that view is right the argument is no more than an argument *ab inconvenienti*, and the answer would be that our Act is less convenient than would be an Act prescribing valuation by separate interests. I must not of course be taken to express an opinion that an Act drawn so as to impose as a first step the valuation of separate interests would in fact be a better or more convenient statute than that which in my opinion goes no further than that that is not the meaning of the Land Acquisition Act.

As to the argument that under the English Acts dealing with similar subjects it is the established practice to value separate interests, I can only say that the English Acts in their scheme and structure differ so materially from the Land Acquisition Act that in my opinion it would be unsafe to make any inference from the practice prevailing in England. I repeat that I by no means assert that the difference in procedure must necessarily lead to any substantial difference in the result, I limit myself to saying that in my judgment the method contemplated by the Land Acquisition Act is that of ascertaining first the market value of the land as if all separate interests combined and then of apportioning that value among the persons interested. It is said that that method may on occasion prove downright imprac-

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ticable or unfair, but it will be time to consider such a case when it actually arises.

Then comes the question ; does this view of the methods of the Act decide the appeal in the respondent's favour ? In my opinion it does not. For, though the market value of the land has to be ascertained on the assumption that all separate interests combine, that, I think, only means that the separate interests are taken to combine so as to give a complete title to the assumed purchaser and the acquiring body, not so as to impress upon the land a character which it did not bear or to give to it a value which it never had in the market ; for it is still the "*market value of the land*" which has to be determined ; and by that is meant, I think, the price which would be obtainable in the market for that concrete parcel of land with its particular advantages and its particular drawbacks, both advantages and drawbacks being estimated rather with reference to commercial value than with reference to any abstract legal rights. If that is correct, it furnishes an answer to the contention that the full quarryable value must be allowed because this land is in fact by natural formation a quarry. That may be so ; but it was never a marketable quarry at the material time, and did not become so till after the Collector had made his award. At the material time the claimant could not have obtained a quarry price for the land in the market because admittedly the permanent building leases, containing no provision for re-entry, stood between him and any immediate ability to quarry ; and the determining factor is the value to the owner, not the value to the acquiring body after acquirement. The case, therefore, seems to me to fall within the principles which have been applied in English cases to owners of land adaptable for use in reservoir sites, and to use the language of Vaughan Williams L. J., in a recent case of that sort, *In re Lucas and Chesterfield Gas and Water Board*<sup>(1)</sup>, I would say that the land here had an adaptability value on the footing of its possibility as a quarry, but that it was not a realised possibility, nor was it competent to the claimant to convert it into a realised possibility by the expedient of buying out the permanent tenants

(1) [1900] 1 K. B. 16.

after the Collector's award had been made, see sections 49 (2) and 50 of the Improvement Act

If I am right in thinking that that is the law, there is an end of the matter, but since the point was taken I may add that in my judgment there is really no particular hardship in this view. For it was the claimant himself who, in pursuance of his own financial interests, sacrificed and abandoned the quarry user of the land for the consideration of the rents obtainable from the permanent tenants, in other words, he himself put it out of his power to use the land as a quarry and he did so with his eyes open and for what he regarded as sufficient consideration. I do not think that he has any fair grievance if when the land comes to be acquired, it is acquired in the character in which alone he had the power of using it

The most that he can fairly claim, in my opinion, is the market value of the land in that character plus a special allowance for its adaptability as a quarry at some future date, and to that I think he is entitled. There is no evidence as to the amount at which this special allowance should be calculated. The Tribunal recognising that the full quarriable value might not be sustained on appeal, give us an alternative finding that as allowance for the special adaptability value the number of years' purchase adopted by the Collector should be increased from 14½ to 18 18. The correctness of this method was at first challenged by Mr Lowndes and defended by the Advocate General, but subsequently Mr Lowndes informed us that he would not dispute it, as his clients were more interested in getting this Court's decision on the questions of principle than in cutting down the allowance suggested by the Tribunal

The result is that if I am right as to why in which this land should be valued, there is now no dispute as to the *quantum* of compensation. In these circumstances and having regard to the special knowledge and experience possessed by the Tribunal on such points, we must adopt the alternative finding, that is to say, the market value of the land will be determined on the valuation made by the Collector subject to this modification that the number of years' purchase will be increased from 14½ to 18 18 years as allowance for the special adaptability value.

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In the circumstances of the case we make no order as to costs.

HEATON, J.—I agree in the order proposed.

The Tribunal have given two valuations: That which they prefer is arrived at by computing the market-value of the land as a whole. But the computation is vitiated because they have taken the quarrying value of the land as realized and not as latent. They have, in short, given to the owners what they consider the land is worth to the acquirer after acquisition, not what they estimate, it would have fetched in the market at the date of the acquisition. Because there is this defect in the computation, I agree with my learned colleague, that the valuation cannot be accepted.

The second and alternative valuation was arrived at by taking each plot separately and allowing some extra value in consideration of the chance of acquiring the adjoining plots so as in the end to get a large quarryable area. How precisely this was done is not explained in detail. The Honourable the Advocate General on behalf of the claimants did not attack that valuation in particular; his argument was that the other valuation must be accepted. Mr. Lowndes for the Improvement Trust withdrew the objections to the alternative valuation which at one time he urged. That being so it seems to me we must accept the alternative valuation.

On the general question, which was most strenuously argued, it is necessary to say a few words.

Mr. Lowndes for the Appellant argued that the correct method of ascertaining compensation for land taken up is to value separately each interest in it. The Honourable the Advocate General for the respondent argued that the correct method is to value the land as a whole and then to apportion to each person interested the share to which he is entitled. Both appealed to the provisions of the Land Acquisition Act in support of their arguments; and we have had those provisions carefully read and commented on. Taking the scope of the Land Acquisition Act and its words and giving them the best consideration I can, it seems to me that neither method is excluded and that what is intended is a fair and reasonable estimate of the compensation to be

awarded and that this is to be arrived at by taking into consideration certain specified matters and excluding from consideration others. The Act seems to me to leave a great deal to the discretion of the Collector and the Court, and amongst other matters, to leave it to their discretion to ascertain the market value of the land either by the method advocated by Mr. Lowndes or by that which receives the support of the Honourable the Advocate General. I do not think this opinion conflicts with what was decided in *Bhimrao's case*<sup>(1)</sup>, for in that case it was not held that valuation by computing different interests separately was universally wrong, but that it was correct to follow the other method in that case. But Mr Lowndes argues that even if the Land Acquisition Act leaves the question open yet section 49 cl (2) of the Bombay Improvement Act, which Act incorporates certain portions of the Land Acquisition Act, absolutely requires that the compensation must be ascertained by valuing separately the separate interests. The argument does not convince me. I think the Bombay Improvement Act leaves the choice of method open, just as the Land Acquisition Act does. The latter part of clause 2 of section 49, no doubt does contemplate the valuation of a separate interest and when a case such as is contemplated there actually arises—it has not arisen before us—no doubt such valuation as is required will be made.

R. R.

(1) (1909) 10 Bom L R 57.

## APPELLATE CIVIL.

*Before the Honourable Mr Justice Chandavarkar, Acting Chief Justice,  
and Mr. Justice Heaton.*

JIVANJI JAMSHEDJI LAKDAVALA (ORIGINAL DEFENDANT),  
APPELLANT, v. BARJORJI NASSERIANJI AND OTHERS (ORIGINAL  
PLAINTIFFS), RESPONDENTS.\*

*Appointment of a Committee for management of property—Appointment  
acquiesced in by owner—Committee in management for a long time—Suit by  
Committee against a trespasser in ejectment—Title.*

The Parsi Panchayat at Bombay appointed a committee to manage the property of the Parsi Anjuman at Surat. The committee managed the property

\* Second Appeal No 121 of 1905

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for a very long time—sixty years—with the authority and acquiescence of the Parsi Anjuman. Subsequently the defendant having trespassed on the property, the committee sued him in ejectment. The defendant contended that the plaintiffs had no right to sue for the recovery of the property as they were neither the owners nor the nominees of the Anjuman.

*Held*, that the plaintiffs being in possession for a long time with the authority and acquiescence of the owners, namely, the Parsi Anjuman at first were entitled to recover possession from a trespasser.

SECOND appeal from the decision of W. Baker, Acting District Judge of Surat, reversing the decree of G. M. Kharkar, Additional Subordinate Judge of Surat.

The land in suit known as the Lal Agiari and situate in the City of Surat was formerly occupied by an Agiari (a Parsi temple). The Agiari was burnt down in the great fire of 1857 and since then the land remained waste. The land formed part of the property of the Parsi Anjuman at Surat. In the year 1856 certain property of the Anjuman was entrusted to a committee for management and the committee managed the property in suit at least since 1871 and continued to do so till about the year 1904 when the defendant trespassed on the land. The plaintiffs who were the representatives of the committee of management, thereupon, brought the present suit to eject the defendant from the land.

The defendant contended *inter alia* that the land in dispute was not the property of the Parsi Anjuman, that the plaintiffs were not the managers of the property and had never been in possession, that the property was the ancestral property of the defendant and had been in his possession as such. He further contended that the suit was not maintainable inasmuch as the procedure laid down in section 30 of the Civil Procedure Code (Act XIV of 1852) was not followed.

The Subordinate Judge found that the plaintiffs were the managers of some of the properties of the Parsi Anjuman at Surat, their appointment as managers being made by the trustees at Bombay and not by the Parsi Anjuman at Surat and that the suit was not maintainable for non-compliance with the procedure laid down in section 30 of the Civil Procedure Code (Act XIV of 1852). He, therefore, dismissed the suit.

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On appeal by the plaintiffs the District Judge found *inter alia* that the suit was not barred by section 30 of the Civil Procedure Code (Act XIV of 1882), that the land in suit belonged to the Parsi Anjuman and was under the management of the plaintiffs and that the land did not belong to the defendant and he had encroached upon it. The District Judge, therefore, reversed the decree and allowed the claim. The following are extracts from his judgment —

I may point out that they (managers) do not render accounts to the trustees, but the trustees render accounts to them, and that they have absolute discretion as to the manner in which the income is to be spent provided of course it is spent on charitable objects. It might therefore be argued that their position is not that of ordinary agents. But apart from this there is evidence that though they have not been formally appointed managers by the Anjuman, which apparently never meets, there is evidence that they are in possession and management of a considerable portion of the Anjuman property, and that they are regarded as representatives of the community of Parsis at Surat. Further, it is to be noted that all their management is quite open and that their accounts are printed and published yearly, (there are about 50 volumes of accounts on the record of this case), and that the Parsi Community have acquiesced in this management. Now after 60 years the authority of the managers is challenged and though the actual property in dispute is not very valuable or important the decision of this case will have far reaching effect on the whole question of the managers' position, which is the reason why the present case is so hotly contested.

\* \* \* \* \*

The fact that they are agents for the trustees in Bombay for the distribution of certain funds has nothing to do with this. I have already pointed out that these properties are not under the management of the Bombay trustees and that they could not appoint the managers their agents for the management of them. The plaintiffs are not suing as agents of the Bombay trustees but as persons who with the tacit acquiescence of the Anjuman have managed the bulk of the Anjuman property for 60 years. I am of opinion that section 20, Civil Procedure Code, does not apply to a case like the present, which is analogous to the case of the trustees of a Hindu temple and Mahomedan mosque suing to recover property belonging to the temple or mosque. It may be that the plaintiffs were never formally appointed by the Anjuman, but they and their predecessors (and the succession has been regularly kept up) have acted as managers of the Anjuman property for 60 years. It is now too late to question the validity of their acts.

The defendant preferred a second appeal.

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*L. A. Shah* for the appellant (defendant).

*Robertson* and *H. C. Coyaji* with *N. K. Koyaji* for the respondents (plaintiffs).

CHANDAVARKAR, Ag. C. J.—The respondents brought this suit to recover possession of the lands in dispute from the appellant alleging that from time to time a Committee of Managers had been appointed at Surat for the purpose of managing the properties of the Parsi Anjuman of that place; that the respondents were the present Committee, the first respondent being Chairman thereof; that the lands in dispute belonged to the Parsi Anjuman and had been in the management and possession of the respondents. They sought to recover possession in the capacity of managers. They also alleged that the appellant was a mere trespasser and was therefore liable to be ejected.

The first issue in the Court of first instance was:—"Whether the plaintiffs are the managers of the property of the Parsi Anjuman of Surat." The appellant applied to the Subordinate Judge that that issue might be modified by adding to it the words "appointed by the Parsi Anjuman." The Subordinate Judge thought it was unnecessary to allow the amendment, because, in his opinion, the words proposed to be added were mere surplusage.

It is common ground that the appointment of the respondents as a Committee was not by the Parsi Anjuman. The finding of the District Judge is also to that effect. He finds that they and before them their predecessors forming the Committee, of which the respondents are members, were appointed by the Parsi Par-chayat in Bombay to administer certain trusts and the appointments had nothing to do with the Parsi Anjuman of Surat. Basing his argument on this finding of fact, Mr. Shah for the appellant contends that the respondents have no right to sue for recovery of the lands in dispute since these admittedly belong to the Anjuman and the respondents are not the Anjuman's nominees. But the District Judge has also found on the evidence that with the acquiescence of the Parsi Anjuman of Surat the respondents have been managing certain properties including the property in dispute, having received them in the year 1816 from one

Bhikbaijee who till then had held them under and with the authority of the Parsi Anjuman

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Now upon those facts found by the learned District Judge it is quite clear that the respondents are entitled to succeed. Though they are not the owners of the property and though they were not appointed Board of Managers for the purpose of holding this property by the Parsi Anjuman yet, for sixty years they have managed the property with the authority and acquiescence of the Parsi Anjuman. Therefore the case falls within the principle enunciated by the late Chief Justice of this Court in *Narroji Manekji Wadia v Dastur Kharsedji Manekji* (1)

In that case a similar objection to the title of plaintiff there was raised, but it was disallowed on the following ground ' Even if there be difficulty or doubt as to its ownership it is obvious that there must be some one entitled to protect from improper invasion that, which for brevity, we will call the temple property, and it appears to us that those who can propagate of themselves that they have exercised the management, authority and supervision alleged in the plaint are so entitled ' In the present case the management, authority and supervision of the property have been vested in the respondents since 1816 and that with the knowledge, consent and acquiescence of those who are admitted to be the owners of this property, namely, the Parsi Anjuman

For these reasons the District Judge was right in the conclusions at which he arrived and his decree must be confirmed with costs

HEATON, J. —I also have no doubt that the District Judge who has written a very careful judgment is right in his conclusions

The plaintiffs seek to recover possession from a trespasser. The trespasser seeks to retain possession on the ground that the plaintiffs are not entitled to sue for possession, because they were not the owners. But it is established in the case that the plaintiffs have actually been in possession for a long period of

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years, I think, more than 30 years, with the tacit acquiescence of the true owners. If that is not a sufficient title on which to sue a trespasser for possession, it is very difficult to say what is, at least in the case of any claim to possession by any person not an absolute owner.

*Decree confirmed.*

G. B. E.

## APPELLATE CIVIL

*Before Mr Justice Batchelor and Mr Justice Heaton*

1900

June 21.

MAHADEV NARAYAN LOKHADE (ORIGINAL PLAINTIFF) APPELLANT  
v. VINAYAK GANGADHAR PURANDHARE AND OTHERS (ORIGINAL  
DEFENDANTS), RESPONDENTS \*

*Dekkhan Agriculturists' Relief Act (XVII of 1879) section 2—Agriculturist—A person who is an agriculturist in 1871 but is not so in when the suit is brought in 1905 cannot claim the benefit of the Act*

In 1871, the defendant executed a mortgage in plaintiff's favour. It was provided that the mortgage was not to be redeemed before 1880. The defendant was an agriculturist at the date of the mortgage but he was not one when the suit was brought. In 1879, the term 'agriculturist' first received a legal definition in the Dekkhan Agriculturists' Relief Act. In the suit by the plaintiff upon the mortgage the defendant claimed the benefits of the Act, on the ground that his liability under the mortgage was not incurred till 1879 and it was admitted that the defendant was not an agriculturist at the date of the suit—

*Held*, that the liability incurred by the defendant was to pay back the money borrowed by him, and that liability was incurred when the money was borrowed in 1871.

*Held*, further, that in 1871 the defendant, whatever may have been his occupation in fact, could not have been an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, which was enacted in 1879.

*Held* also, that the defendant was not entitled to the benefit of the Act.

SECOND appeal from the decision of Ruttonji Munchergji, First Class Subordinate Judge A P at Poona, confirming the decree passed by T. N. Sanjana, Subordinate Judge of Haveli.

On the 6th December 1871 the defendant No. 1 executed a mortgage-deed in favour of plaintiff. The mortgage was not to be redeemed before 1886.

In 1905, the plaintiff brought this suit to foreclose the mortgage.

The defendant No. 1 was an agriculturist in 1871 and 1886, but he was not one in 1905

The Dekkhan Agriculturists' Relief Act, which contained the definition of 'Agriculturist' was first enacted in 1879.

The defendant No. 1 contending that he was an agriculturist at the date of the bond sued upon and at the date when he incurred liability under it in 1886, claimed the benefit of the Dekkhan Agriculturists' Relief Act, 1879.

The Subordinate Judge who tried the case held that the defendant was an agriculturist and in decreeing the plaintiff's claim against him, made the decretal amount payable in instalments under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The Subordinate Judge remarked as follows :—

The chief contention in this case is as regards the status of the defendants Nos. 1, 3, 4 and 5. Admittedly they were not agriculturists on the date of the suit. It is contended that the defendant No. 1 was an agriculturist on the date of the bond sued upon.

There is no other evidence adduced to prove this excepting the statement of defendant No. 1. But I see no reason to doubt his statement. He states that at the time he maintained himself out of the agricultural income of his lands and followed no other occupation. The plaintiff does not seem to deny this. But the learned pleader for the plaintiff contends that the words "an agriculturist within the meaning of that word as then defined by law" in rule 2nd of section 2 of the Dekkhan Agriculturists' Relief Act show that the persons claiming the status of an agriculturist after the passing of the original Act are only included in the term and not those claiming that status before the Act was passed.

The definition of the term is inclusive and not exclusive. The words "shall include a person in the 2nd rule" show that the intention was to apply the Act as well to persons who were agriculturists when the liability in the suit was incurred as to those who are so when the suit is instituted. *Danu v. Krisnambat, P. J.*, 1886, page 159. The above rule 2 lays down that in the former case, i.e., in the case of a person who claims to be an agriculturist when the liability was incurred his status should be determined in case the liability

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was incurred after the passing of the original Act according to the definition of the term at the particular time. But it does not exclude the case of a person who claims to be an agriculturist before the original Act was passed when the liability as in this case was incurred before 1879. The defendant No 1 was an agriculturist when the liability was incurred as he earned his livelihood at the time wholly by agriculture and I find that he is entitled to the benefit of the provisions of the Dekkhan Agriculturists' Relief Act.

On appeal, this decree was confirmed by the First Class Subordinate Judge with appellate powers on the following grounds :—

No exception is taken to the correctness of the decree passed by the Court below provided defendant No. 1 (respondent) be found an agriculturist on the date the mortgage bond was executed or on the date the liability was incurred. Mr Lokhande for the appellant founds his argument upon explanation (2) section 2 of the Dekkhan Agriculturists' Relief Act of 1879. It says that "the term agriculturist . . . should include a person, who when . . . the liability was incurred was an agriculturist within the meaning of that word as then defined by law." Now what do the words "when the liability was incurred" mean, and much depends upon the way in which they are construed. The words are no doubt not happily chosen. At first sight they may mean that the liability was incurred on the day the mortgage bond was executed. If so, there was then no enactment in force of the nature of the Dekkhan Agriculturists' Relief Act, and there was no law, in which the word "agriculturist" was defined. If this construction be placed on the said words a bond /de agriculturist would be debarred from the benefit of the Dekkhan Agriculturists' Relief Act in respect of any bond or mortgage or any other writing executed prior to 1879 when the Dekkhan Agriculturists' Relief Act came into force. To construe these words we must look to the object, and scope of the enactment. The very title by which it is distinguished shows that the Act was passed to relieve the indebtedness existing among the agricultural population prior to 1879. The said words should therefore mean when the liability becomes due, or in other words when the right to sue occurs. This happened in 1886. The definition of the word "agriculturist" has undergone several amendments since the passing of the Act in 1879. Even according to the old definition defendant No 1 was an agriculturist both when the bond was passed and the liability was incurred, for it is not disputed that he was then earning his livelihood wholly and principally by agriculture.

The plaintiff appealed to the High Court

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as brought.

The question then is was he an agriculturist within the meaning

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of the Dekkhan Agriculturists' Relief Act, 1879, when the liability was incurred? Here the liability was incurred in 1871, when the mortgage-deed was executed, but when there was not enactment defining the term "agriculturist."

The lower Courts have erred in holding that the liability was incurred in 1886, at that date the debt became payable, the liability was incurred in 1871

*P. P. Khare* for respondent No 1 (defendant No 1) —The Dekkhan Agriculturists' Relief Act, 1879, was introduced for the first time in 1879 with a view to relieve the then indebtedness as well as the future indebtedness of agriculturists. As the debt in the present case was contracted in 1871 and remained unpaid until after the passing of the Dekkhan Agriculturists' Relief Act, the case of defendant No 1 is one of indebtedness contemplated to be relieved against by the introduction of the Act in 1879.

As to the debt in question here, the liability to pay was incurred in 1886, when it became payable or due till that date the mortgagor did not become liable to pay the debt though the deed sued upon was passed in 1871.

*P. D. Bhide* for respondent No 2

BACHELOR, J.—This appeal arises out of a suit filed by the mortgagee to recover the mortgage debt with costs and further interest by sale of the mortgaged property. The first defendant replied that he was an agriculturist and claimed the benefits of the Dekkhan Agriculturists' Relief Act. The lower Courts have allowed the first defendant the benefits of the Act, and the question involved in this appeal is whether he is entitled to them in this case. The particular shape which they have assumed is the form of instalments which have been granted at the rate of Rs 100 a year. Whether the first defendant is an agriculturist or not turns upon the construction of sub section (2) of clause (b) of section 2 of the Dekkhan Agriculturists' Relief Act. It is there provided that the term "agriculturist" when used with reference to any suit or proceeding, shall include a person who, when any part of the liability which forms the subject of that suit or proceeding was incurred, was an agriculturist within the

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meaning of that word as then defined by law. The mortgage-bond in suit here was executed in 1871, and under the mortgage it was provided that the mortgagor should not redeem before 1886. It is contended before us that the first defendant's liability was not incurred till 1886, inasmuch as it was not till then that repayment of the debt became obligatory, and that we understand is the view adopted by the learned Judge below. But it does not appear to be possible to put that construction fairly upon the words of the section. What was the liability incurred here? The liability incurred was to pay back the money borrowed by the mortgagor and it is clear that that liability was incurred when the money was borrowed in 1871. That is not the less so by reason of the stipulation that the payment was not due till 1886. The liability to repay in 1886 was incurred in 1871.

As to the other argument which was addressed to us it is enough to say that since this liability was incurred in 1871, and since the Act of 1879 contained the first legal definition of the word "agriculturist" it follows that when he made this mortgage, the first defendant whatever may have been his occupation in fact, could not have been "an agriculturist within the meaning of that word as then defined by law", for there was then no such legal definition existing.

The result is that the first defendant is not entitled to the benefit of the Dekkhan Agriculturists' Relief Act. This appeal must be allowed and there must be the ordinary decree for sale under section 83 of the Transfer of Property Act in the form prescribed by the Civil Procedure Code.

The mortgagee will be entitled to add the costs of this appeal to his mortgage-debt.

*Decree reversed*

R R

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Act XXIII of 1855 (Administration of mortgaged Estates), as modified		1a. 3p (1a)
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	p to 1st October	1a. 6p (1a)
1907		
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 Regulations made under the Statute 33 Viet., Cap. 3 from 1907 up to date  
 [The above may be obtained separately. The price is noted on each.]

GENERAL INDEX, TITLE, &c.,  
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RATANLAL RANCHHODDS, *Fakil, High Court.*

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## Note to Binder.

Pages 53-54 published herewith should be substituted for those published in the number for February 1909.

— — — — — **ANU MALLANT v KASHIBAI**  
WIDOW, DEFENDANT AND RESPONDENT \*

1908  
February 25

*Transfer of Property Act (IV of 1882), section 55, clause (1) (b) clause (6)*  
*—Vendor's lien for unpaid purchase-money—Sale deed containing acknowledgment of receipt of consideration money in full—Mortgagee taking the mortgage without notice of unpaid purchase money—Estoppel—Evidence Act (I of 1872), section 115*

In a registered sale deed of a chawl it was stated that the vendor had received consideration in full and there was also an acknowledgment of the vendor at the foot of the deed to the same effect. The vendor had also parted with all the title-deeds relating to the property. The vendee subsequently mortgaged the property to the plaintiff who had no knowledge that the full amount of the consideration money was not paid to the vendor though he knew that the vendor was in possession of some portion of the property.

*Held* that the defendant (the vendor) was estopped from contending that she had a lien on the chawl for the unpaid balance of the purchase money by her declaration as to the receipt of the whole purchase money and by her act in handing over the title deeds.

*PER DITCHLOE, J.* — A vendor of immovable property who endorses upon the purchase deed a receipt for the purchase money cannot set up a lien for unpaid purchase money as against a mortgagee for value without notice under the purchaser.

ONE Mahomedali mortgaged to the plaintiff, by a registered deed dated 7th April 1904, a chawl for securing in trust for the person or persons who had accepted or discounted or would thereafter accept or discount at the plaintiff's request hundis, notes, etc., drawn or payable by the mortgagor for the aggregate sum not exceeding at any time the amount of Rs 7,000.

The mortgagor handed to the plaintiff deeds and muniments of title relating to the said property including a registered deed of sale from the defendant to the mortgagor, dated 3rd April 1903. At the foot of this deed it was endorsed that the sum of



1908

TRILAKM

v  
KASHIBAI

Rs 9,000 had been paid as consideration money by the mortgagor and received by the defendant in full.

The plaintiff demanded on the 12th May 1905 from the mortgagor the sum of Rs. 6,455-3-6 for principal, interest and costs due by him and in default of payment gave notice that the plaintiff would exercise the power of sale reserved to him. No answer having been received from the mortgagor the plaintiff caused the chawl to be put up for sale by auction to be held on the 16th September 1905.

On 13th September 1905 the defendant for the first time intimated to the plaintiff that Rs 4,000 out of the consideration money still remained unpaid to her by the mortgagor and therefore called upon the plaintiff not to put up the said chawl for sale as the plaintiff's mortgage could not affect the defendant's rights and interests in the property.

The plaintiff alleged that he was a *bona fide* mortgagee for value without notice of the defendant's alleged lien and entitled to possession of the chawl under the mortgage-deed, and that as the defendant knowing that the amount of the purchase money had not been received by her in full caused it to be false stated otherwise in the said deed and had also parted with other title deeds relating to the said chawl, she was estopped from setting up her lien if any.

The plaintiff prayed for a declaration that he was entitled to sell the chawl under the mortgage-deed free from any claim of the defendant, and for an order directing the defendant to deliver possession to the plaintiff of the said chawl and the four rooms therein in her personal occupation.

The defendant contended that the mortgage was a fraudulent transaction, that the sale deed was not explained to her, that the vendee (the mortgagor) by a writing of even date agreed to pay to her the balance of the purchase-money, that she was in possession of the chawl in exercise of her right of lien as unpaid vendor, and the plaintiff was aware of her possession, that she had obtained a High Court decree against the mortgagor for the amount of Rs 3,414 due to her, that she was fraudulently induced to part with her title deeds by the mortgagor alleging that they



# THE INDIAN LAW REPORTS,

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APPEAL FROM THAT COURT

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AND  
THE SUPERINTENDENT OF GOVERNMENT PRINTING, BENGAL



## JUDGES OF THE HIGH COURT.

---

### Chief Justice.

SIR BASIL SCOTT, *Kt* (*On leave from 11th June to 24th July*).

HON MR N G. CHANDAVAIYAR (*Acting from 14th June to 24th July*).

### Puisne Judges.

HON. MR. L. P. RUSSELL (*On leave*).

„ N. G. CHANDAVARKAR.

„ S. L. BATCHELOR

„ D. D. DAVAR

„ F. C. O. BEAMAN.

„ J. J. HEATON.

„ N. C. MACLEOD (*Acting*)

„ R. KNIGHT (*Acting*).

---

HON. MR. T. J. STREANMAN (*Advocate-General*).

MR. L. C. CRUMP (*Legal Remembrancer*).



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————— SEC. 23.					
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————— SECS. 102, 103, 117.					
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————— SEC. 244.					
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————— SEC. 276.					
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*Rail, Brothers v. Goolbas Mulchand* (1890) 15 Bom. 376 and *Bank of Bengal v. Lyobhoy Ganguly* (1891) 16 Bom. 618, applied

*See also* *at the same the opinion Courts Act*

BHAG *vs* DHANAMBI *v. A. DESAI FRENCHMAN* (1903) 33 Bom. 706



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———O VI r 17		644
<i>See CIVIL PROCEDURE CODE</i>		

of the other relations of the child, does not carry with it the right to give in adoption, for that is a right which can only be exercised by a parent.

*Punchappa v Sanganbarawa* (1899) 21 Bom. 89, considered

POTLABAI & MAHADU ...

.. (1908) 33 Bom 107

**ADOPTION—Hindu Law—Adoption by a widow—Alienation by the widow prior to the date of adoption—Right of the adopted son to dispute the alienation]**

Where a Hindu widow who has inherited her husband's property adopts a son, the adoption has the effect of divesting her of the property and putting an end to her estate as heir of her husband. The adoption has the same effect as her

maintenance  
maintenance  
conflict on  
mortgage.

inheritance there  
necessary purpose  
transfer logically  
since it could only  
be as heir and the

*Lakshman v Radhabai* (1887) 11 Bom 609 and *Moro v Baiya* (1894) 19 Bom 800 followed *Sreeramulu v. Kastamma* (1902) 26 Mad 143, not followed

RAMAKRISHNA & TRIPURABAI ..

.. (1908) 33 Bom 58

————— *Hindu law—Adoption of a married man, having a son—The son's*

is adopted

In the absence of any special custom, Jains are governed by the ordinary Hindu law

KALGAJDA TAMANAPPA & SONAPPA TAMANGAYDA ..

.. (1909) 33 Bom 609

————— *Succession to the adopted son—Adoptive mother entitled to succeed in preference to the adoptive father to a son taken in adoption—Mitakshara—Hindu Law*

See HINDU LAW ..

.. 404

**ADVERSE POSSESSION—Adverse possession between tenants in common—If A constitutes adverse possession—Acts of exclusive possession—Ouster]** The property in dispute belonged jointly to two brothers G and D. The plaintiffs obtained possession in ..

possession ..  
sua ..  
No ..  
but it was held on the ..  
possession by partition of a  
moety of the property ..  
Collector who on the 11th of December 1893 effected the partition and made over symbolical possession to V of his share. This share was sold to plaintiff on the 18th March 1899. Meanwhile on the 4th October 1894, O sold the whole of the property to defendant's father. The plaintiff eventually sued on the 4th October 1900, to recover possession of the property from defendant. The latter contended that the claim was barred by adverse possession.

ADMINISTRATION SUIT—*Indian Trusts Act (II of 1882)* see 81—*Executor*—

TRIMBAK MAHADEV v. NARAYAN HARI

... (1909) 33 Bom. 129

to submit r  
Code (let  
submission

usual accounts and to determine what the matter came before the Assistant large mass of accounts, objections and

On appearing before the Assistant  
anding that the matter in dispute

stant Commissioner in a summary  
ce beyond the accounts, objections  
with their attorney

16th defendants with their attorney  
r attorney had agreed to the above  
the Assistant Commissioner

Commissioner, the Assistant Commissioner  
in turn his proposal and told  
on funding on them. To this they

be binding on them. If that was the  
 old take one rupee if that was the  
 the Assistant Commissioner should  
 taken by the

large sum in costs. At another meeting

latter recorded his findings and then embodying these findings therein but

and by his decision. Upon application  
adjustment of the suit might be recorded  
the Code on the basis of the Assistant

of the suit. There had been no

ment of the suit. There had been no  
provided by section 4 of the Indian  
Act, and no legal and valid reference  
to an award.

was an award  
have no legal  
no award there

under section 510 of the

Bom 30<sup>1</sup> and Pragdas & Girdhardas

... (1803) 33 Born

band in adoption by a Hindu widow  
 (see 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 8

ADOPTION—Gift of a son by first husband in adoption by a Hindu widow after her re marriage—*IT 2 1917 100*—*See* *IT 1550* sets 2, 3, 100 her son in

after her re marriage—  
4 and 5 ] According  
adoption results from  
her husband. Assume

her husband. Assume  
son in adoption the H  
any indication that the legislature intended to deprive her of it

The right of guardianship, which under the provisions of Act XV of 1856 section 3, may, under certain conditions, be transferred from the mother to one

of the other relations of the child, does not carry with it the right to give in adoption, for that is a right which can only be exercised by a parent.

*Panchappa v Sanganbasawa* (1899) 24 Bom. 89, considered

*PUTLABAI v MAHADEU* ... .. (1903) 33 Bom 107

**ADOPTION—Hindu Law—Adoption by a widow—Alienation by the widow prior to the date of adoption—Right of the adopted son to dispute the alienation** [Where a Hindu widow, who has inherited her husband's property, adopts a son, the adoption has the effect of divesting her of the property and putting an end to her right of alienation. The adopted son has the effect of her maintenance and the property is transferred to him and he can confer on himself, as he is a son, the same rights as a son.]

Thus, if a widow, before the adoption, severs a portion of the inheritance therefrom and transfers it to a stranger, without any proper or necessary purpose binding the estate absolutely according to Hindu Law, the transfer logically speaking must cease to have any effect after the adoption, since it could only operate during the time that the estate was represented by her as heir and the result of the adoption is to terminate that estate.

*Lalshman v Radhabai* (1887) 11 Bom 609 and *Moro v Balaji* (1894) 10 Bom. 809, followed *Sreenamulu v. Asistamm* (1902) 26 Mad 143, not followed

*RAMAKRISHNA v TRIPURABAI* ... .. (1908) 33 Bom 58

————— **Hindu law—Adoption of a married man having a son—The son's**

is adopted

In the absence of any special custom, Jains are governed by the ordinary Hindu law

*KALGAUDA TATAYAPPA s. SOMAPPA TAMANGAUDA* ... (1909) 33 Bom 609

————— **Succession to the adopted son—Adoptive mother entitled to succeed in preference to the adoptive father to a son taken in adoption—Mitalshara—Hindu Law**

*See HINDU LAW* ... .. 401

**ADVERSE POSSESSION—Adverse possession between tenants in common—What constitutes adverse possession—Acts of exclusive possession—Ouster** [The property in dispute belonged jointly to two brothers G and D. The plaintiffs obtained a decree on a mortgage-bond against D as manager of the family, and in execution of the decree the property was sold to V. When V. sought to take possession of the property he was obstructed by G and he had to file a suit against G to remove the obstruction. In that suit it was held on the 29th November 1886 that V was entitled to recover possession by partition of a moiety of the property. The defendant G was ordered to pay the costs of the Collector who on the 11th of December 1886 ordered V to take over symbolical possession to V. On the 18th March 1898 Mea, the whole of the property to defend the 4th October 1906, to recover possession of the property from defendant. The latter contended that the claim was barred by adverse possession,

*Held*, that to entitle the defendant to add to the period of his own adverse possession (which was admittedly less than 12 years before the date of the present suit) the period of his vendor's adverse possession was also adverse, for partition was alive and capable of his exclusive possession, because d  
basis of the mutual rights and obligations of the parties prevented them from setting up any title contradicting it and thereby giving to either a new cause of action against the other

The question of adverse possession as between tenants-in common depends not on a reversion of the tenant-in-common by partition but on exclusive occupation by one co tenant amounting to an ouster of the other.

ANBITA RAJJI & SHRIDHAN NARAYAN ... (1908) 33 Bom. 317

ADVERSE POSSESSION ...  
... inconsistent with plaintiff's title  
... inconsistent with plaintiff's ownership  
See OWNERSHIP ... 712

AGREEMENT—Agreement to pay a certain sum in consideration for a promise to marry—Part payment—Failure of the agreement—Suit to recover part payment—Agreement by way of marriage brokerage—Difference between agreement and contract—Indian Trusts Act (II of 1892), see 41—Ind in Contract Act (IX of 1872), secs 2 (g) (h), 20—35, 65  
See CONTRACT ACT ... 411

... used as a document—Agreement to lend money  
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... capable of specific performance—  
... Stamp duty to the document—  
See STAMP ACT ... 121

AGRICULTURIST—A person who is an agriculturist in 1871 but is not one when the suit is brought in 1905 cannot claim the benefit of the Act—Delhi an Agriculturists' Relief Act (XVII of 1879), sec 2.

See DEHLIAN AGRICULTURISTS' RELIEF ACT ... 501

... of a bhag—Suit to set aside  
... of 1862, sec 3.  
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Hindu Law—Adoption—Adoption by a widow—Alienation by the widow prior to the date of adoption—Right of the adopted son to dispute the alienation

See HINDU LAW ... 68

AMENDMENT OF PLEADINGS—Defence of the bar of limitation—Practice as to amendment of plaint—Civil Procedure Code (Act V of 1908), O. VI, r 17.

See CIVIL PROCEDURE CODE ... 644

Rs. 5,000—  
Practice  
of the Land  
in dispute  
and not to

*Laxmi v. Ala* (1908) 33 Bom 631, followed.

RANCHODDBHAI : COLLECTOR OF RAIBAI

(1909) 33 Bom. 371

ground that owing to conspiracy among the villagers (including the decree-holder) the sale was at an undervalue. A week later, but within the month allowed, he again applied to the Court to set aside the sale under section 310A

of the Court

*Held*, (1) that the order passed by the Subordinate Judge was appealable

*Pita v. Chunilal* (1906) 31 Bom 207, followed

Procedure of 1882.

Decree of the District Judge confirmed

*Golam Ahad Chowdhry v. Juddhster Chundra Shaha* (1902) 26 Cal. 112, followed

HARIHAR KANTA v. RAMA PARDU

(1909) 33 Bom 693

Record  
Refusal  
of Judge  
in  
District  
persons

Against the order of the District Judge an appeal was preferred to the High Court

*Held*, that no appeal lay. The District Judge's order was passed under section 505 of the Civil Procedure Code (Act XIV of 1882) and not under section 503. It was therefore an order which was not appealable, not being specified in the list of orders in section 588

*Birajan Koor v. Ram Churn Lall Mahata* (1851) 7 Cal 719, followed

BAI MANI v. KUMCHAND

(1908) 31 Bom. 104

**APPEAL—Decree—**No specific direction as to accounts in the decree—Court cannot direct accounts to be taken before the Commissioner when parties have arrived at an agreement after the decree.] An appeal lies against an order of a Judge sitting on the Original Side if that order decides a question of some right between the parties.

**SIR JENABOIR COMMISSIONER, THE HOPE MILLS, LIMITED** .. (1903) 33 L.M. 211

— *Making a new case.*

*See PRACTICE* ... ..

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— *Money decree—*Appeal by some of the parties to a decree—Decree is appeal final—Execution—Civil Procedure Code (Act XIV of 1882), sec. 231, 232—Limitation Act (XV of 1877) sec. 11 cl. 179.] Where some of the parties to a decree appeal against it, the decree in appeal is the final decree for the purpose of execution with respect to all the parties.

**SHIVRAM v. SAKHARAM** ... ..

(1902) 33 E. 59

*See SMALL CAUSE SUIT* ... ..

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**APPEAL COURT—Criminal jurisdiction—Order** ... .. *with security—Criminal Procedure Code (Act V of 1898), sec. 10* ... ..

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**APPEAL IN PROPRIETARY PROCEEDINGS—Pleadings fees—Taxation—Scale of costs—Act I of 1818, sec. 7—Practice** ... ..

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*See PRACTICE* ... ..

**APPEAL PENDING FROM ORDER—Contempt of Court—Notice of motion for committal—Service of notice—Stay of proceedings** ... ..

*See CONTEMPT OF COURT* ... ..

6.

**ARBITRATION—Award—Suit to file an award—Want of jurisdiction as to arbitrators can be pleaded—Award is equivalent to a judgment even before a decree is passed upon the award—Patrim is effected by the award itself.] When a suit is brought to enforce an award a party to it can urge and show that it is not binding upon him on the ground of want of jurisdiction in the arbitrators.**

it has passed into a decree or where it directs partition to be made at the moment of its date it is void.

**Muhammad Nawaz Khan v. Alau Khan** (1891) 15 Cal. 314 and 142 is a case where the award is not binding on the ground of want of jurisdiction in the arbitrators. *See* ... ..

**CHITRAO v. RADHABAI** ... ..

(1904) 33 P.M. 10

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ARBITRATION— <i>Suit for administration—Reference to Commissioner—Parties agreeing orally to submit to Commissioner's decision—Commissioner's award—Civil Procedure Code (Act XIV of 1892), sec. 375—Adjustment of suit, what is—Written submission necessary.</i>	
<i>See ADMINISTRATION SUIT</i>	69
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ASSIGNMENT— <i>Lease unregistered when admissible as evidence—Conduct of parties to lease—"Collateral purpose"—Transfer of Property Act (IV of 1882), sec. 107—Law—charge</i>	
<i>See LEASE</i>	610
————— <i>Mortgage with possession—Lease to mortgagee—Death of the mortgagor and his surviving undivided brother—Sister entitled as heir—Possession and management by mortgagee's widow—Payment of the rent by the tenant in good faith to mortgagee's widow—Suit by sister for recovery of rent—Assignment by lessor not necessary—Transfer of Property Act (IV of 1882), sec. 50.</i>	
<i>See TRANSFER OF PROPERTY ACT</i>	66
<i>—Attachment of son's attached share—Civil</i>	
<i>See HINDU LAW</i>	261
————— <i>Money decree—Execution—Attachment and sale of property mortgaged with possession to a third person—Auction purchase by judgment creditor with leave of Court to confirmation if said mortgage was fraudulently obtained—Redemption—Estoppel—(Act XIV of 1892), secs. 278, 282, 283 and 287.</i>	
<i>See CIVIL PROCEDURE CODE</i>	311
————— <i>Toda Giras Allowance—Attachment and sale of in execution of a decree—"Money likely to become due," interpretation of—How far can the allowance be attached and sold—Toda Giras Allowance Act (Bomb. Act VII of 1897), sec. 5</i>	
<i>See TODA GIRAS ALLOWANCE ACT</i>	253

*Held*, that neither the signature of the Srb Registrar nor the statement by the writer that the body of the document was written by him were sufficient for effecting a valid mortgage



An attesting witness is a "witness who has seen the deed executed and who signs it as a witness"

*Burdett v. Spilsbury* (1843) 10 C & F. 310, followed

*Ravi v. Laxman Rao* ... (1908) 23 Bom 11

ATTORNEY'S COSTS—*Petition—Taxing Master—High Court Rules, Rule 514—*  
An attorney can obtain an order  
if client disputes the retainer as

*In re Jones* (1887) 36 Ch. D. 103, followed

*In re Madhavji* ... (1908) 23 Bom 677

AUCTION-PURCHASER—*Morey decree—Executor—Attachment and sale of*  
*property mortgaged with possession to a third person—Auction purchase by*  
*judgment creditor will leave at Court subject to mortgage—Sust by judgment*  
*creditor prior to*  
*that the mortgage is*  
*of redemption—Do*  
*(Act XIV of 1882)* . . .

# Sec CIVIL PROCEDURE CODE

AWARD—*Arbitration—Suit to file an award—Want of jurisdiction in the*  
*arbitrators can be pleaded—Award is equivalent to a judgment even before a*  
*decree is passed upon the award—Partition is effected by the award itself*  
When a suit is brought to enforce an award a party to it can urge and show  
that it is not binding upon him on the ground of want of jurisdiction in the  
arbitrators

An award is equivalent to a judgment whether it has passed into a decree or  
not. It is binding upon the parties. In cases where it directs partition to be  
effected, it dissolves the joint family and from the moment of its date it severs  
their joint int tests

*Muhammad Nizar Khan v. Alam Khan* (1891) 18 Cal 414 and *Laldas v*  
*Bai Lala* (1905) 11 Bom L. R. 20, followed

*Bhaurao v. Radhabai* ... (1909) 33 Bom 401

—*Suit for administration—Reference to Commissioner—Parties agreeing*  
*orally to submit to Commissioner's decision—Commissioner's award—Civil*  
*Procedure Code (Act XII of 1852), sec 375—Adjustment of suits, what is—*  
*Written submission necessary*

# See ADMINISTRATION SUIT

BATTA—*Defendant summoned for examination—Dekkhan Agriculturists' Relief*  
*Act (Act II of 1879) sec 7*

See DEKKHAN AGRICULTURISTS' RELIEF ACT

BHAG—*Unrecognised suit division of a bhag—Alienation—Suit to set aside the*  
*alienation—Limitation—Bhagdars Act (Bom Act V of 1862), sec 3*

See BHAGDARI ACT

BHAGDARI AND RAHWADARI TRANSFERS ACT (BOM ACT V OF 1862),  
c. 10

# GENERAL INDEX.

The Bhagdari Act (Bom Act V of 1872) *comports with the law of the land* provision of necessary implication abrogates the law of the land as to a private person

Datta v Parag (1902) 4 Bom L R 707 and *J Chahal v Nathalal* (1902) 4 Bom 399, distinguished

ADAM UNAT & BART BAWALI

BHA

See CIVIL PROCEDURE CODE

BOMBAY ABKARI ACT (BOM ACT V OF 1878), *sec 3* (1878, 47) *Import by sea into the Bombay Harbour—Import, 'as such' of 'B' of 'C' Act (VIII of 1878), sec. 19* Section 3 of the Bombay Abkari Act (Bom Act V of 1878) does not prohibit importing opium generally; it merely prohibits importation unless duty has been paid

ur

in

been afforded and has been used

The term 'import' as used in the Bombay Abkari Act, 1878, includes the carrying into any part of the Presidency of Bombay by sea.

EMPEROR C. DE SYLA

CITY IMPROVEMENT ACT (BOM ACT IV OF 1864) *Collector—Acquisition of interest by claimant after Collector's order—References to the Tribunal of Appeal—Consolidation of references—Land Acquisition Act (I of 1894) sec 23.*

See LAND ACQUISITION ACT

RANCHHODHAI v COLLECTOR OF KAIRA

ACT III OF 1801—*Chief of the duty—Public Servant—(1801) of 1800, sec 21, 180.*

See PENAL CODE

MUNICIPAL ACT (BOM ACT III OF 1888), *sec 351—Construction*

The word 'appear' in the section does not involve 'appear to the eye' It is

therefrom, it follows that first, the degree of danger must be ascertained, and then the appropriate precautionary measures prescribed. Where it is not suggested that the danger is imminent, a duty is imposed on the Commissioner to decide judicially what should be done to assure the safety of the public having due regard to the interest of the owner of the structure

Pr St D 304,  
in L R 754

be taken

If the own

Under certain circumstances the safety of the public must be considered in priority to the right of private individuals, as in the case of imminent danger, but where there is no suggestion of imminent danger, the person affected is entitled to be heard as a matter of common justice

LALBHAI & MUNICIPAL COMMISSIONER OF BOMBAY

(1908) 53 Bom 231

BOYRAY DECOMMISSION

—Suspension  
a priv leg-  
the admi-  
influence  
for

the purpose of bringing the administration of justice into contempt

A pleader, who presides at a public meeting and therein procures the passing of a resolution contemptuously denouncing or protesting against the conduct of a

High Court Judge in passing sentences at a trial at the Criminal Sessions, is guilty of misbehaviour (under section 36 of Regulation II of 1827)

GOVERNMENT PLEADER *v* JAGANNATH

(1908) 33 Bom 252

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*Ajudhia Pershad v Baldeo Singh* (1894) 21 Cal 818, followed

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*Bai Shirinbai v Khavshedji* (1896) 22 Bom 430, followed

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*Bank of Bengal v Byabhoj Gangyi* (1891) 16 Bom 618, applied

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ARDESIR DEJONGHI SURTI & SIED SHIDAR ALI KHAN ... (1903) 33 Bom 610	

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See CRIMINAL PROCEDURE CODE . . . . . 77

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See CRIMINAL PROCEDURE CODE . . . . . 241

CHARGE—

events section 54 does not have any for the Indian Trusts Act does not affect the

regulate procedure. It never applied Indian Evidence Act entirely super-

ceded it

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trustees,  
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these five heads.

A suit brought not to establish a public right in respect of a public trust, but to remedy a particular infringement of an individual right is not within section 539 of the Civil Procedure Code, 1892.

Section 539 contemplates a suit either in the name of the Advocate-General at the instance of relators, or a suit in the name of parties having an interest in the trust with the consent of the Advocate-General. The "interest" of the parties here contemplated must be the "interest" that is threatened or infringed.

A well established and ancient usage prevailing amongst a community must override such of the tenets of its religion as are shown to have fallen into desuetude and conflict with ancient usage prevailing in the community.

*Peshotam Hormasji Dastoor v. Meherbai* (1889) 13 Bom 302 and *Bai Shrinbai v. Kharshedji* (1896) 22 Bom 430, followed.



Although the conversions of Juddins is permitted amongst Zoroastrians, such conversions are entirely unknown to the Zoroastrian community in India, and far from being customary or usual for it to convert a Juddin, the Zoroastrian community of India has never attempted, encouraged or permitted the conversion of Juddins to Zoroastrianism.

Even if an entire alien—a Juddin—is duly admitted into the Zoroastrian religion after satisfying all conditions and undergoing all necessary ceremonies, he or she would not, as a matter of right, be entitled to the use and benefit of the funds and institutions under the defendants' management and control, these were founded and endowed only for the members of the Parsi community, and the Parsi community consists of Parsis who are descended from the original Persian emigrants, and who are born of both Zoroastrian parents, and who profess the Zoroastrian religion, the Iranis from Persia professing the Zoroastrian religion, who came to India either temporarily or permanently, and the children of Parsi fathers by alien mothers who have been duly and properly admitted into the religion.

*Held by DEAN, J.*—The decision of a suit under sect 53 of the Civil Procedure Code, 1852, is not only binding on the parties to it, but to all persons affected by it.

Any extension or limitation of the scope of a trust as to exclude those who were intended to be included or to include those who were intended to be excluded, is a breach of trust.

The Zoroastrian religion does admit and enjoy conversion. The Indian Zoroastrian who is theoretically adhering to their ancient religion and consistently avowing its principal tenets, including, of course, the merit of conversion as a theological dogma, erected about themselves real caste barriers, and gradual fall under the influence of the caste idea, till, in modern popular language, it has found current expression in the term Parsi, which now seems to have as much of a caste meaning and as essentially a caste connotation as that need to designate any other great Indian caste. In the Zoroastrian community, with the religion and its ritual purity are still the manning of the communal life, they are so intimately bound up with the exclusiveness and the purity of the tribe or caste, that they have become practically identical. It is therefore fairly accurate to describe the Indian Zoroastrians as Parsis—thereby implying a caste or communal or tribal organisation.

Conversion.—In the abstract at any rate, and as a technical religious matter was perfectly familiar to the Parsi community, not only in the remote past but in our own time.

It was not the intention of the founders of the trusts in question to extend the benefits to any one who was not in the most rigid caste with Parsis, the members into the community of the Indian Zoroastrians and born of an Indian Zoroastrian father.

SIR DINKER MANEKJI PATEY v. SIR JAMSHEDJI JEEJI — (1900) 23 Bom. 33

CITY OF BOMBAY MUNICIPAL ACT (BOM. ACT III OF 1863), SEC. 204—Construction.—Municipal Commissioner—Power to remove encroachments.—Exercise of the power.—Apparatus of—Directions issued in the Commissioner—Exercise of discretion through officers.—Act of Commissioner to a

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party to remove structure in ruinous condition—Right of the party to be heard by the Commissioner in answer to the notice—Injunction restraining Commissioner from pulling down a house

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the plaintiff.

On appeal by the defendant,

bei precedence or privilege  
 Co the business of the Civil  
 wt teachers from preaching  
 disturbed or interfered with no office or property is

For interference with mere dignity no suit can be maintained.

For voluntary offerings received no suit will lie

*Sri Sankar Bharti Swami v. Siddh Lingayah Charant:* (1813) 3 Moo. I. A. 128, *Singapa v. Gangapa* (1878) 2 Bom 476 and *Rama v. Shriram* (1892) 6 Bom. 116, referred to

*Boyer v. Dodsworth* (1796) 6 T. R. 681, followed.

MADHUSUDAN PARGAT & SHRI SHANKARACHARYA . . . (1908) 33 Bom 278

SEC. 13—Pec judicata—Plex  
 gal—  
 of  
 to it

CHHAGANLAL & BAI HARKHA . . . . . (1909) 33 Bom. 479

SEC. 23—Lands situate at  
 different villages and in possession of different persons under different titles—

Lands who older es of  
action.

*Held*, on second appeal, that though the lands were situate in several different villages, provided the venue for the trial is the same, the right of the plaintiff to have her claim tried in one suit is the same as if the different holdings were all in the same village. It is never any bar to a suit in ejectment that many persons are in possession. The only possible objections were on the ground of inconvenience. The difficulties arising from variety of defences can be cured by the successive trial of the issues separately affecting different defendants. Following the English practice interlocutory judgments may, if the plaintiff succeeds, be given against different defendants as their cases are disposed of, final judgment for possession of the whole property being reserved till the conclusion of the trial of the whole case.

*Ishan Chunder Hazra v Rameswar Mondol* (1897) 21 Cal 831 and *Nundo Kumer Dasler v Banomali Gayan* (1903) 19 Cal 871, approved.

*Sami Chetti v Amman Achy* (1873) 7 Mad H C R 250, *Vasudeva Shanbhaga v Kuleadi Narnayai* (1874) 7 Mad H C R 290, *Mahomed v Krishnan* (1887) 11 Mad 106 and *Parbati Kunwar v Mahmud Fatima* (1907) 29 All 267, referred to.

*Kachar Bhoj Vaya v Bai Rathore* (1883) 7 Bom 289, distinguished.

UMABAI v VITHAL ... (1909) 33 Bom 293

CIVIL PROCEDURE CODE (ACT XIV OF 1882) SECS. 103, 103, 117—*Suit dismissed owing to absence of Counsel—Plaintiff present with his witnesses—Rule allowing costs of two Counsel—Junior Counsel should return brief if* of the Civil  
t Notwith-  
t can under  
unt an I can  
Counsel to

examine the witnesses.

The rule of allowing the costs of two Counsel on each side in taxation was introduced by the Judges in order to obviate the dislocation of the business two or more  
always been  
Counsel must  
able to attend  
of the junior  
until he can come in  
... (1908) 33 Bom 473

ESMAIL EBRAHIM v HAJI JAV MAHOMED ...

SECS. 231, 214, 252—*Hindu Law—Mitakshara—Liability of sons to pay father's debts—Money decrees—appeal final—Execution—money decrees obtained against the Mitakshara law can be it of the ancestral property*

that has come to their hands even if the debt has been incurred for the sole

*Umed Hathising v Goman Bhaiya* (1895) 20 Bom 385, followed.

cation,  
before  
between  
under

Where some of the parties to a decree appeal against it, the decree in appeal is the final decree for the purpose of execution with respect to all the parties

SHIVRAM v SAKHARAM

(1908) 33 Bom 50

CIVIL PROCEDURE CODE (ACT XIV OF 1882), sec 214—Decree—Execution—Transfer of Property Act (IV of 1882) sec 93

See DECREE

... 273

secs 214, 310A, 311—  
*Decree—Execution—Sale at Court auction—Application to set aside sale on the*  
*they also*  
*he sale at*  
*the sale*  
*ding the*  
decree holder) the sale was at an undervalue A week later, but within the

SECTION 214 OF THE CODE

*Held*, (1) that the order passed by the Subordinate Judge was appealable

*Pita v Chunilal* (1906) 31 Bom 207, followed

(2) that the allegation in the first application being that the sale had been brought about by the friend of the residents of the village where the lands were situate and where the decree holder resided, the application must be regarded as an application under section 214 and not under section 311 of the Code of Civil Procedure of 1882

Decree of the District Judge confirmed

*Golam Kund Chowdhury v Juddister Chandra Saha* (1902) 30 Cal 142, followed

HARINAR KANTA v RAMA PANDU

(1909) 33 Bom 698

secs. 278 2 2 283 AND 237—  
*Money decree—Execution—Attachment and sale of property mortgaged with possession to a third person—Auction purchase by judgment-creditor with leave*

One suit to recover possession of the lands—Misjoinder of parties or causes of action—Interlocutory judgments against different defendants—Final judgment for possession to be reserved till the conclusion of the trial] The plaintiff, one of  
n laoda  
ns who  
holder

In the lower Courts the suit was dismissed for misjoinder of parties or causes of action

*Held*, on second appeal, that though the lands were situate in several different villages, provided the venue for the trial is the same, the right of the plaintiff to have her claim tried in one suit is the same as if the different holdings were all in the same village. It is never any bar to a suit in ejectment that many persons are in possession. The only possible objections were on the ground of inconvenience. The difficulties arising from variety of defences can be cured by the successive trial of the issues separately affecting different defendants. Following the English practice interlocutory judgments may, if the plaintiff succeeds be given against different defendants as their cases are disposed of final judgment for possession of the whole property being reserved till the conclusion of the trial of the whole case.

*Ishan Chunder Hazra v Rameswar Mondol* (1897) 24 Cal 831 and *Nundo Kumar Dasker v Banamoli Gagan* (1903) 29 Cal 871, approved.

*Sami Chetty v Ammani Achy* (1873) 7 Mad H C R 240, *Vasudeva Srinathaya v Kuleadi Nainapay* (1874) 7 Mad H C R 290 *Mahomed v Krishnan* (1881) 11 Mad 100 and *Parbati Kunwar v Mahmud Fatima* (1907) 29 All 267, referred to

*Kachar Bhoj Vojra v Bai Rothore* (1883) 7 Bom 289, distinguished

UMADAI v VITHAL

..

..

... (1909) 33 Bom 293

CIVIL PROCEDURE CODE (ACT XIV OF 1882) SECS. 102, 103, 117—*Suit dismissed owing to absence of Counsel—Plaintiff present with his witnesses—Rule allowing costs of two Counsel—Junior Counsel should return brief if*  
no Counsel is present in Court. Notwithstanding Sections 102 and 103 of the Civil Code the Court can under a relating to the suit and can examine his witnesses or suggest that he should instruct some other Counsel to examine the witnesses.

The rule of allowing the costs of two Counsel on each side in taxation was introduced by the Judges in order to obviate the dislocation of the business at the same time in two or more. This rule has always been one or other Counsel must neither being able to attend when the case is called on, and that in case of dispute it is the duty of the junior to return the brief or to make arrangements for some other Counsel to attend until he can come in.

ESMAIL EBRAHIM v HAJI JAV MAHOMED ...

... (1908) 33 Bom 475

Law—*Mitalshara*—*Liability of Appeal by some of the parties to a Limitation Act (XV of 1877), s. 1* the father of an undivided Hindu family executed after his death against his

SECS 231, 244, 252—*Hindu*

that has come to their hands even if the debt has been incurred for the sole

*United Hathising v Goman Dhayr* (1895) 20 Bom. 383, followed.

rising in execution,  
to the suit before  
questions between  
disposed of under

Where some of the parties to a decree appeal against it, the decree in appeal is the final decree for the purpose of execution with respect to all the parties

SHIVRAM v SAKHARAM ... (1903) 33 Bom. 39

CIVIL PROCEDURE CODE (ACT XIV OF 1892), sec 244—Decree—Execution—Transfer of Property Act (IV of 1882) sec 93

See DECREE ... 273

secs 244, 310A, 311—

decree-holder) the sale was at an undervalue. A week later, but within the

SECTION 244 OF THE CODE

*Held*, (1) that the order passed by the Subordinate Judge was appealable.

*Pita v. Chunilal* (1906) 31 Bom. 207, followed.

(2) that the allegation brought about by the facts and where the application under sec 244 of the Code of 1892

Decree of the District Judge confirmed

*Gulim Akai Choudhry v. Judhister Chundra Shaha* (1902) 30 Cal. 142, followed.

HARINAR KANTA v RAMA PANDU ... (1909) 33 Bom. 698

secs 278, 282, 283 AND 287—  
Money-decree—Execution—Attachment and sale of property mortgaged with possession to a third person—Auction-purchase by judgment-creditor with leave

of  
sal  
anc  
up  
and

mortgaged with possession to a third person. At the auction sale the plaintiffs themselves purchased the property with the leave of the Court subject to the mortgage. Before the sale was confirmed and the decree was satisfied the plaintiffs having brought a suit for a declaration that the mortgage was fraudulent and without consideration it was contended that the plaintiffs were no longer judgment creditors but purchasers and that what was attached and sold was equity of redemption, therefore the purchasers could not claim more than they bought.

*Held*, that the suit was brought before the confirmation of the sale and the satisfaction of the decree the plaintiffs were judgment creditors and not purchasers.

*Held*, further that the plaintiffs under their purchase were not purchasers of merely the equity of redemption and were not bound by estoppels which would have bound the judgment debtor. There is nothing to prevent such a purchaser from benefiting by the clearance of any claim upon the property even if he has himself to sue to procure it. He may alike displace a fraudulent and redeem an honest mortgage.

GANESH v PURSHOTTAM

(1909) 33 Bom 311

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SECS 320-323—*Decrees—Execution against Talukdar's estate—Consent of the Talukdar Settlement Officer—Gujarat Talukdars Act (Bom Act VI of 1888 as amended by Act II of 1903) sec 31*

SEE GUJARAT TALUKDARS ACT

... 419

Dekkha

(Act V

of the

Oral ev

to be w

Under the

the plaintiffs brought a redemption

the form of a sale deed was

section 10A of the Dekkhan Agriculture Act

the defendant contended that oral evidence was not admissible to prove that the sale deed was really a mortgage. After the issues were framed the plaintiffs applied for

that the d

otherwise o

Relief Act (Act VI of 1888) was not applicable. The Court passed an order for the withdrawal of the suit with liberty to bring a fresh suit.

SECS 378 AND 632—

Civil Procedure Code

mortgage—Sec 10A

379) not applicable—

of suit—Suit allowed

(material irregularity)

Act (XVII of 1879)

in

d by

The

ring a fresh suit on the grounds

was as to the admissibility of

f the Dekkhan Agriculturists

the Court passed an order for the

withdrawal of the suit with liberty to bring a fresh suit

*Held* that the Court acted with material irregularity in passing the order.

The Court should not allow a suit to be withdrawn after the parties are ready for trial if such withdrawal may operate to the prejudice of the defendant.

A plaintiff cannot be allowed to withdraw a suit in order that he may wait and see if the law is not altered at some future date in such a way as to enable him to obtain a decree against the defendant who is ready for trial and prepared to resist the claim and certain of success on the law in force.

MANIPATI v. NATHU

(1909) 33 Bom. 722

CIVIL PROCEDURE CODE (ACT XIV OF 1882), SEC. 375—*Suit for administration—Reference to Commissioner—Parties agreeing orally to submit to Commissioner's decision—Commissioner's award—Adjustment of suits, what is—Written submission not necessary.* The parties to an arbitration suit consented to it being referred to the Commissioner to take the usual accounts and to determine their respective shares. In the usual course, the matter came before the Assistant Commissioner for taking accounts and a large mass of accounts objections and surcharges were filed by the various parties. On appearing before the Assistant

at this meeting and after their attorney had agreed to the above course suggested by the Assistant Commissioner, the Assistant Commissioner himself explained

*Held*, that there had been no adjustment of the suit. There had been no written submission to arbitration as provided by section 4 of the Indian Arbitr-

under section 375 of the Civil Procedure

*Samdai v. Premji Prigji* (1895) 20 Bom 391 and *Prigji v. Gardharis* (1901) 26 Bom 76, considered and distinguished.

रुक्मणदाय व. आदमजी शाह राज्हाय ... (1904) 33 Bom 69

secs 503, 505 AND 508—  
*Recommendation by Subordinate Judge of a person to be appointed receiver—*  
to  
the  
the  
the

Against the order of the District Judge an appeal was preferred to the High Court.

*Held*, that no appeal lay. The District Judge's order was passed under section 503 of the Civil Procedure Code (Act XIV of 1882) and not under section 505. It was therefore an order which was not appealable not being specified in the list of orders in section 505.

*Birajan Koor v. Ram Churn Lall Mahata* (1881) 7 Cal 719, followed.

दास मनी व. कुमचन्द ... (1904) 33 Bom 124

sec 529—*Religious or Charitable Trusts*—"Further or other relief," meaning of] *Held* by DARR, J.—



Section 533 of the Civil Procedure Code 1882 is limited in its scope and operation. It contemplates a suit for relief, "obtain a decree" for clearly decree in the suit. It is not a branch of the suit. It is not a relief which has been obtained. (a) the appointment of a new scheme. . . . .

to reliefs wholly outside those specifically defined under these five heads. . . . .

A . . . .  
to r . . . .  
533 . . . .

Section 533 contemplates a suit either in the name of the Advocate-General or in the name of a party, or a suit in the name of parties "having an interest in the trust with the consent of the Advocate-General. The "interest" of the parties here contemplated must be the "interest" that is threatened or infringed.

Held by MR JUSTICE J. — The decision of a suit under section 533 of the Civil Procedure Code 1882, is not only binding on the parties to it, but to all persons affected by it.

The expression "such further or other relief" in the section means such further or other relief as, from the nature of the introductory words and the exemplification cases, appears to the Court to be appropriate in such a suit, e.g., removing fraudulent trustees, restraining a breach of trust, and so forth.

Any extension or limitation of the scope of a trust, so as to exclude those who were intended to be included or to include those who were intended to be excluded, is a breach of trust.

SIR DINNIA MAVERJI PETIT v. SIR JANSETTI JIJIBHAI . . . (1903) 33 Bom 503  
CIVIL PROCEDURE . . . . .

Court—Jurisdiction . . . . .

choice in the performance of it. . . . .  
obstructing the plaintiffs in the exercise of the right so declared. It was objected to the suit that it was not that, but a . . . . .  
reform by themselves or to get . . . . .  
and there was no contest as . . . . .

held, that the suit was of a civil nature.

An act on would lie against the plaintiffs by the Advocate General acting on behalf of the public to compel them to a due execution of their particular acts of duty. The obligation cast on them by the trust gave them a corresponding right to disburse the funds after getting the religious worship for which those funds were intended, properly performed. Such a right was not the less of a civil nature though the funds were to be appropriated to religious ceremonies. The Court was not called upon to enter into the adjudication of any rites or ceremonies as such. What it had to decide was the right of the trustees to fulfil the trust unhindered.

TRIMBAK GOPAL v KRISHNAPAO PANDURANG

(1900) 33 Bom 87

CIV

plaintiffs did deliver Rs 4001 worth of cloth to the defendants as alleged, but the case is to the conclusion that no partnership was created and held that the suit as framed would not lie. The plaintiffs appealed mainly on the ground that the partnership had been created and that the suit was in order. When the appeal

was allowed, the defendants were ordered to pay the plaintiffs the amount of Rs 4001 with interest. The defendants appealed to the High Court contending that the amendment was wrongly allowed.

Held that the amendment was rightly allowed. The defence of limitation was a defence only in so far as the defendants were never fairly entitled and the allowance of the amendment only withdrew from them an advantage which they ought never to have received.

PER BATHURST J.—Under the Civil Procedure Code 1903 O 11, r 17, all amendments ought to be allowed at any stage of the proceedings, which satisfy the two conditions (a) of not working injustice to the other side and (b) of being necessary for the purpose of determining the real questions in controversy between the parties.

Amendments should be refused only if the amendment would cause him an injury or if the amendment is merely a particular case of this

KISANDAS PURCHAND v RACHAPPA VITHOBA

(1900) 33 Bom 611

COAST GUARD—Import by sea into the Bombay Harbour—'Import' meaning of—Sea Customs Act (VIII of 1878), sec 10—Bombay Abolition Act (I of 1878) sec 3 (10) 9, 43

See BOMBAY ABOLITION ACT

.. .. 350

COMMISSION TO EXAMINE WITNESS—Insolvent's property at Shanghai—Property of insolvent at Shanghai vests in Official Assignee of the Insolvent

*Debtor's Court at Bombay—Court can order insolvent at Shanghai to hand over property to Official Assignee in Bombay—Court can order commission to examine insolvent at Shanghai—Indian Insolvency Act (11 and 12 Viet., c. 21), secs. 7, 26 and 26.*

See **INSOLVENCY ACT (INDIAN)** ... .. 461

... .. same result } The  
... .. that it involves or  
... .. ulator or exploiter  
that is to say, a person who purchases the land wholesale from the claimant in order afterwards to sell it retail for building purposes.

... .. must be regarded, and that is the  
... .. profitable terms. The owner is  
... .. way of selling his land by reason  
... .. sale of the land in  
... .. doubt, allowance  
... .. of the speculator  
... .. these expenses unless the municipality  
And there is no necessary reason why  
arise to the speculator for a business

When compensation is fixed on the general principle of a sale of the land split up into parcels suitable for building, it is not only necessary but inappropriate to make a special deduction on account of the small area marked off for the roadway.

Where the method of hypothetical development is employed for assessing ... .. gaining the present value  
... .. of neighbouring lands,  
... .. touch the same result,  
... .. such the greater degree of  
... .. development is itself  
corroborated

... .. to prices realised  
... .. mer sales can be  
... .. to the sale of the  
... .. various conditions  
... .. is not a matter

which can be reduced to any hard and fast rule

**TRUSTEES FOR THE IMPROVEMENT OF THE CITY OF BOMBAY. KAESANDIS**  
(1908) 33 Bom 23

... .. Market value of land—Methods of assessing the market  
value—Correct method  
IV of 1868—Valuation  
Collectors award—  
reference—London

See **LAND ACQUISITION ACT** ... .. 452

... .. Mode of valuation when no recent sales—Market value—Sur-  
veyors' estimates—Objections to surveyors' report—Determination of value of  
frontage land—Building frontage, how determined—Relative value of back land

and frontage—Hypothetical building sch<sup>m</sup>, v<sup>l</sup>ue of—Value of whole land, how derived from value of part—Collector's award—Land Acquisition Act (I of 1894), sec. 18.

See LAND ACQUISITION ACT ... .. 325

CONSENT—*Gujarat Talukdars' Association*—*Decree*—*1*  
of 1902, see 31—*Decree*—*1*  
*Talukdars' Settlement Officer*—

nt to the Talukdars  
 ns of Collector and  
 decrees against or in  
 320—325 of the Civil  
 ns framed a scheme  
 one of the villages  
 'death of the original  
 3! of the Gujrat  
 of the amendment.  
 1 that what he had  
 1882, and that as he

had not given his written consent to the arrangement as provided by the amended section 31, the darkhist preferred by the decree-holder should be disposed of.

**PER CHANDABABAI, J.**—If a person holding a certain office is empowered by law in virtue of that office to give previous consent in writing to certain proceedings or acts as a condition precedent to their legality or validity, and the person as a matter of fact gives such consent, it cannot be the less a

given it

Where a certain act requires the concurrence of an official person, there is a presumption in favour of its due execution on the ground of the legal maxim

Where the two offices are combined in one and the same person on grounds of public convenience or expediency, his action must be referred to the exercise of his discretionary powers under both the capacities if it can be so referred.

Section 31 of the Gujarāt Talukdars' Act (Bom Act VI of 1888) requires that there must be (1) consent, (2) it must be previous, and (3) it must be in writing. If these conditions are fulfilled the requirements of the section are complied with. No particular form is requisite.

PURSHOTTAM v. HARBHAMJI .. ... (1909) 33 Bom. 443

**CONSIDERATION**—*Agreement to pay a certain sum in consideration for a promise to marry—Part payment—Failure of the agreement—Suit to recover part payment—Agreement by way of marriage brokerage—Agreement—Contract—Difference between the two—Indian Trusts Act (II of 18-2), sec. 81—Indian Contract Act (IX of 1-72), sec. 2 (g), (4), 20-33, 65*

See CONTRACT ACT ... .. 411

CONSOLIDATED  
Act IV of  
after Caste  
tion Act (11/1891), see 23

See LAND ACQUISITION ACT

Improvement Act (Bills  
of interest by eminent  
Appeal—Land Acquisition

42

without due consideration to the provisions of the section and the right of individuals

RAJPAH & MUNICIPAL COMMISSIONER OF BOMBAY ... (1908) 33 Bom. 321

CONSTRUCTION OF TERMS—*Manila Law—Mortgage—Jura sua—Finality*  
form] It is a principle enunciated by Vigneshwara that where all *scripts* are  
of equal importance and where there is a conflict between two or more writers,  
the Court is free to choose any it likes.

CIVILIL, SURABAM

(1897) 33 B.L. 443

... *script* and *scripture*—*Mortgage by deed* and  
... which is subject to a charge under the will—  
... only with mortgage—*Mortgagee's* ... to  
... and legacies under will—*Legs. of time between*  
... a doubt as to execution of mortgage, effect of

See MORTGAGE AND MORTGAGES

CONTUMPT OF COURT—*Criticism of Judge—Language used in criticism which*  
strikes at the root of all respect for the Court] Any act done or writing published  
to lower  
e lawful

Judges and Court are alike open to criticism, and if reasonable argument or  
expostulation is offered against any judicial act as contrary to law or the public  
good, it is not a contempt of Court.

*Key v. Gray* [1900] 2 Q.B. 73, followed

*In re NARASIMHA CHINTAMAN KEKAR*

(1900) 33 P.W. 210

... *Notice of writs* ... *for* ... *of* ...  
... *than* ... *not* ... *of* ...

of client.

of a Court's  
in an appeal

*Gordon v. Gordon* [1901] P. 114, followed

*RE MOORHEAD & CHANDLER PANDUR*

(1900) 33 P.W. 120

CONTRACT—*Agreement to pay a certain sum in consideration for a promise to*  
*waive—Part payment—Failure of the agreement—Duty to recover part payment*  
*—Admission by any of contract a breach—Inference between agreement and*

contract—Indian Trusts Act (II of 1889) sec 84—Indian Contract Act (IX of 1872) secs 2(7) (f) 20—30 6.

See CONTRACT ACT

411

Place of performance of contract by *Palik Adaty*—Custom—Jurisdiction—*Palik Adat* agency

See PAKKI ADAT AGENCY

361

CONTRACT ACT (IA OF 1872) SECS 2 (g) (I) 20-3; 65-Ind a; Trusts Act (II of 1882) s c 84-Agreement to pay a certain sum in consideration for a promise to marry-Part payment-Failure of the agreement-Suit to recover

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*Held* that having regard to the character of the agreement between the parties the plaintiff was entitled to recover the sum from the defendant.

GULABCHAND &amp; FELDAI

(100) 23 Dom 411

CONTRACT ILLEGAL—Salt pans—Lease and license from Collector—  
 Lessee not to sub let without Collector's permission—Sub let by the lessee with  
 out such permission—Deposit by sub lessee with lessee—Suit by sub lessee to  
 recover deposit on title—Salt Act (Bomb Act II of 1860) s 11 a 147

**See SALT ACT**

636

COSTS—*ip2* cala : *I* rotate *Preced* ngz—*Pleaden* s *fees*—*Total* cn—*let I* of 1846

**See FRACAST CE**

• 9.6

—Petition—Tax of Master—High Court Rules Rule 514—Solicitors retainer  
denied—Taxation of costs

See AUTO NEWS COSTS

67

—Rule allo q es ts of two Counsel—Junio C nsel shoul return br of f  
 1 e th r Com s lable to be 3 resent—Pract ce

## SEPTIC

43

COUNSEL COSTS—Suit dismissed on account of Counsel—Plaintiff present  
in his own person—Rule allowing costs of two Counsel—Junior Counsel should  
not be brief if the other Counsel able to be present—Practice—Civil Procedure  
Code (1st Ed. of 1885) sec 102 103 and 117

See CIVIL PROCEDURE CODE

- 47 -

COURT FEES—*Suit for declaration and consequential relief—Valuation—Jurisdiction—Value of the relief stated in the plaint—Suits Valuation Act (VII of 1887), sec. 8.*

See SUITS VALUATION ACT

COURT FEES ACT (VII OF 1887) sec. 8. *Valuation of family matter of certain times overables and was*

Rs 5 600 The plaint was presented in the Court of First Class Subordinate Judge. The Subordinate Judge should be treated the Court fees Act, turned the plaint for

*Held*, reversing the orders that the suit fell within the jurisdiction of the First Class Subordinate Judge.

*Held*, further, that the suit fell not within section 7 (iv) (b) but under section 7 (v) of the Court fees Act, 1870, and section 8 of the Suits Valuation Act 1887, did not apply. That, therefore, it was the market value of the lands houses, &c, that determined the jurisdiction of the Subordinate Judge.

*Motibhai v Haridas* (1896) 22 Bom. 315, commented on.

DADU v TOTALAM

(1909) 33 Bom 658

Liability of the workman to — sec 31—Court fee on petition of complaint—breach of Contract Act (XIII of 1872) not competent paid on the

petition of complaint

EMPEROR v DHONDU

(1904) 33 Bom. 22

CRIMINAL PROCEDURE CODE (ACT V OF 1898) sec 106 (3)—Order to furnish security—C of appeal Court | Sec

*Mahmud Sheikh v. As Sheikh* (1891) 21 Cal. 622, *Muthiah Chetty v Emperor* (1905) 29 Mad 190 and *Paramasara Pillai v Emperor* (1908) 30 Mad. 44, distinguished from.

*Doraisami Naidu v. Emperor* (1905) 30 Mad. 192, referred to with approval

EMPEROR v BHARUNG

(1905) 23 Bom. 33

secs 225, 233, 234, 235, 236 AND 237—Charges—Joinder of charges—Misjoinder of charges—Indian Penal Code (Act XLV of 1860), secs 121A and 121B—Sedition—Prohibiting

*Publication, what constitutes.* The accused was  
 shable under sections  
 one with respect to  
 his newspaper called  
 nee of the publication  
 by the accused under  
 red the newspaper in  
 h. The accused was  
 was  
 was

*Held*, that the evidence on record was sufficient to prove the publication of the newspaper in Bombay.

*Held*, further, that the trial was not valid as there had been no joinder of charges.

#### Procedure.

There is nothing in the Criminal Procedure Code which directs that where an  
 two or more acts, each of which may fall  
 under one or another section of the Indian  
 either case being the same, the joinder of  
 offences. Substantially the acts amount in  
 ctions of the Indian Penal

are Code does not say  
 says it must be limited  
 kind. The "offence"  
 punishable. The offences  
 of two articles on two

ably to be read as singular  
 Procedure, either express or implied, to exclude from the operation of section 234  
 of the Code, an offence because it is made the subject of more than one charge

Charging one act or series of acts under more than one section of the Indian  
 Code for in section 235 (clause 1) and in section  
 ted for in section 71 of  
 two or over under two  
 sentence which may be  
 her separate offences for

EMPEROR v. TRIBHUVANDAS

(1908) 31 Bom. 77

CRIMINAL PROCEDURE CODE (ACT V OF 1898, secs. 233, 234, 235, 236, 237  
 AND 238)—Charges, joinder of charges—Prise Council, leave to appeal to, in  
 criminal case—Practice and procedure] The accused was charged with an



offence punishable under section 121A of the Indian Penal Code (Act XLV of 1908) in respect of an article which he published in his newspaper and also with offences punishable under sections 121A and 121B of the Code with regard to another article which he published in the same newspaper. For all these offences he was tried at one trial, and was convicted and sentenced for each of them.

*He'it*, that there was no irregularity in the trial on the ground of misjoinder of charges.

Sections 234, 235, 236 and 239 of the Criminal Procedure Code 1908, mentioned as exceptions in section 233 of the Code, are not mutually exclusive. If it had been intended that section 233 (2) or section 236 could not be made use of in co-operation with section 234 this intention could have been easily expressed. If the exceptions are mutually exclusive, the provisions of section 236 or 237 could never be invoked to prevent a miscarriage of justice arising from a failure to make good all the details of a charge joined with two other charges under section 234.

The Legislature could hardly have intended that a joint trial of three offences under section 234 of the Criminal Procedure Code, 1908, should prevent the prosecution from exhibiting at the same trial the main or alternative degrees of criminality involved in the acts complained of.

Sections 235 (1) and 236 of the Criminal Procedure Code, 1908, may be resorted to in framing additional charges where the trial is of three offences of the same kind committed within the year.

Before granting a certificate for leave to appeal to the Privy Council, the Court must be satisfied that there is reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of usual justice.

*Esport Cases* (1907) A.C. 719 and *Dunlop v. Attorney-General of New Zealand* (1901) 11 L.T. 710 followed.

*In re* RAJ GANADHAN TILAK ...

(1907) 32 P.W. 521

CRIMINAL PROCEDURE CODE (ACT V OF 1908), sec. 233.—*Trial by Jury—Trial with the aid of assessors—Difference in the mode of trial—Accused if prejudiced can complain—Provisions—Procedure*. The accused were tried with a jury on charges of murder (sections 302, 304, Indian Penal Code), and with the aid of jurors as assessors on charges of robbing, grievous hurt and hurt (sections 147, 148, 321 and 323 of the Code) respectively.

The Judge charged the jury and asked for the verdict on both the charges in the manner prescribed for jury trials. He agreed with the verdict and sentenced the accused to vary as terms of imprisonment. The accused appealed on the grounds that the learned Judge erred in omitting to take the opinion of the jury as assessors on the second charge and to write a judgment.

*It is* that the law makes no distinction as to the procedure at the trial between a trial by jury and one with the aid of assessors except as to the summing up in the case of the former and the manner in which the verdict in the former and the opinions of the assessors in the latter are respectively taken. It is at this latter point that there is a departure of course, and if the accused who is tried does not in essence take crucial part and get the procedure applicable to trial with the aid of assessors and need be concerned to be heard to complain.

*Ex parte* J. C. VAYAS ...

(1909) 43 P.W. 42

- CRITICISM**—*Language used in criticism which strikes at the root of all respect for the Court—Contempt of Court.*  
*See* **CONTEMPT OF COURT** ... 240
- CUSTOM**—*Palki Adat agency—Place of performance of contract by Palki Adatja—Jurisdiction.*  
*See* **PAKKI ADAT AGENCY** ... 361
- Panchals—Kurbars—Sub divisions of Shudra tribe—Int. marriage and—Burden of proof—Hindu law.*  
*See* **HINDU LAW** ... 693
- DAMAGES**—*Municipalities not keeping a ditch and sluices at a dam in proper order—Collection of the storm water in the ditch—The water passing over lands of another and doing damage—Misfeasance—Municipality—Negligence.*  
*See* **NEGLECT** ... 393
- Parcel containing articles liable to be insured and also not liable to be insured—Loss of the parcel in transit on Railway line—Suit against Railway Company to recover damages with respect to goods not liable to be insured—Railway Company not liable—Articles—Package—The Indian Railways Act (IX of 1890), see 70, sch. II, cl (1).*  
*See* **RAILWAYS ACT** ... 703
- DANGEROUS CONDITION**—*Power to remove dangerous structures—Exercise of the power—Appeal, meaning of—Discretion vested in the Commissioner—Exercise of discretion through agent—Notice by Commissioner to a party to remove structure in ruinous condition—Right of the party to be heard by the Commissioner in answer to the notice—Injunction restraining Commissioner from pulling down a house—City of Bombay Municipal Act (Lum. Act III of 1889), see 334.*  
*See* **BOMBAY MUNICIPAL ACT** ... 334
- DEBT**—*Hindu law—Mitakshara—Liability of sons to pay father's debt—Mortgage—Appeal by some of the parties to a decree—Decree in appeal final—Execution—Civil Procedure Code (Act XIV of 1882) secs 231, 241, 252—Limitation Act (XV of 1877) sch II art 179.*  
*See* **HINDU LAW** ... 39
- Son's liability to pay father's debts—Attachment of son's share in family property—Father's power to deal with the attached share—Hindu law—Civil Procedure Code (Act XII of 1882), see 270.*  
*See* **HINDU LAW** ... 264
- DECLARATION OF OWNERSHIP, SUIT FOR**—*Plaintiff's title proved—Defendant's use found to be not inconsistent with plaintiff's ownership—Presumption—*  
 . . . . . or a declaration  
 . . . . . defendant has taken  
 . . . . . to the land and  
 . . . . . use of the land
- Held*, that plaintiff was entitled to succeed. The said circumstances made out a case for the application of the presumption that possession goes with title.
- Ranjit Ram Panday v. Gokardhan Ram Panday* (1870) 20 W. R. 25 (Ct. Rul.) and *Agency Company v. S.A. & Co.* (1879) 13 App. Cas. 13, followed.

The *batia* is not payable by the plaintiff and the suit is not liable to be dismissed on failure to pay it

GANGASHANKAR V. BAHUR MADHUBHAI ... (1908) 33 Bom 219

ACT (XVII OF 1879) SEC 63 (A)—  
—Signature by the Sub Registrar—  
including the writing of the body of the

document that it was written by him

See TRANSFER OF PROPERTY ACT ... 14

DISCHARGE OF GUARDIAN—Liability of the guardian to suit—Guardians and Words Act (VIII of 1890), sec 41.

See GUARDIANS AND WARDS ACT ... 119

—Power to remove dangerous structures—  
nearness of—Discretion vested in the Com-

party to remove structure in ruins  
by the Commissioner in answer to  
sioner from pulling down a house—  
of 1888), sec 854

See BOMBAY MUNICIPAL ACT ... 334

DISMISSAL OF SUIT—Suit dismissed owing to absence of Counsel—Plaintiff  
present with his witnesses—Civil Procedure Code (Act XLV of 1852), sec 10,  
103, 117

See CIVIL PROCEDURE CODE ... 175

DISTRICT MUNICIPAL ACT (BOM ACT III OF 1901)—Clerk in the case  
collect on a partment of a District Municipality—Public servant—Obstructions  
to a public servant—Penal Code (Act XLV of 1850), sec 21, 186

See PENAL CODE ... 219

DOCUMENT—Statement by writer—Attestation of two witnesses—Signature of the  
Sub Registrar

See TRANSFER OF PROPERTY ACT ... 41

See STAMP ACT ... 42

LIJEC—Anpoint-  
—Sit  
—May  
—June  
—Sixty  
—Recently

the defendant having trespassed on the property, the committee sued him in  
ejectment. The defendant contended that the plaintiffs had no right to sue for  
the recovery of the property as they were neither the owners nor the nominees  
of the Anjuman

Held, that the plaintiffs being in possession for a long time with the authority  
and acquiescence of the owners, namely, the Parsi Anjuman and its members,  
were entitled to recover possession from a trespasser.

JIVANJI JAMNEDJI C. BAHADUR NARAYANJI ... (1901) 26 Bom 10

**EQUITY OF REDEMPTION**—*Money-decree—Execution—Attachment and sale of property mortgaged with possession to a third person—In a purchase by judgment creditor with leave of court subject to mortgage—Satisfied judgment creditor prior to confirmation of sale and satisfaction of decree for a declaration that the mortgage was fraudulent and without consideration—Purchase—Ectoppel binding upon judgment debtor—Civ. Procedure Code (1882) of 1882), secs 276, 281, 283 and 287.*

See CIVIL PROCEDURE CODE . . . . . 311

**ESTOPPEL**—*Lease unregistered when admissible in evidence—Conduct of parties to lease—Collateral purpose—Transfer of Property Act (IV of 1882), sec 107—Loan—Charge Assignment] Section 107 of the Transfer of Property Act does not say that if the parties without any such instrument (i.e., a lease) conduct themselves towards each other as if they were landlord and tenants and money is paid from one to the other in pursuance of that conduct upon the understanding that it would be repaid in a certain event, there shall be no right to recover the money. In such a case the right to recover arises not upon the lease, because according to law no lease exists, but upon an independent equity arising from the conduct of the parties and founded upon the law of estoppel.*

*Cornish v. Abington (1859) 4 H. & N. 519, referred to*

**ARDESIR BEJONJI SURTI v. SYED SIRDAR ALI KHAN** . (1908) 33 Bom. C. 10

— **Money-decree—Execution—Attachment and sale of property mortgaged** . . . . .  
 . . . . .  
 . . . . .  
 1882), secs 278, 281, 283 and 287

See CIVIL PROCEDURE CODE . . . . . 311

— **Transfer of Property Act (IV of 1882), sec 55, cl (4) (b), cl (6)—Vendor's lien for unpaid purchase money—Sale deed containing acknowledgment of receipt of consideration money in full—Mortgagee taking the mortgage without notice of unpaid purchase money—Evidence Act (I of 1873) sec 115]**  
 . . . . . the vendor had received  
 . . . . . of the vendor at the  
 . . . . . reputed with all the  
 . . . . . recently mortgaged the  
 . . . . . in full amount of the  
 . . . . . knew that the vendor

*Held*, that the defendant (the vendor) was estopped from contending that she had a lien on the chattel for the unpaid balance of the purchase-money by her declaration as to the receipt of the whole purchase-money and by her act in handing over the title deeds.

*Per BATHFLOE, J.*—A vendor of immovable property who endorses upon the purchase deed a receipt for the purchase-money cannot set up a lien for unpaid purchase money as against a mortgagee for value without notice under the purchase deed.

**TEJILRAM v. KISHORAM** . . . . . (1908) 33 Bom. 53

In such cases, "everything is presumed to be rightly and duly performed until the contrary is shown." That presumption can be rebutted by proof that certain forms required by law were not complied with.

Where the two offices are combined in one and the same person on grounds of public convenience or expediency, his action must be referred to the exercise of his discretionary powers under both the capacities if it can be so referred.

Section 31 of the Gujarat Talukdars' Act (Bomb. Act VI of 1863) requires that there must be (1) consent, (2) it must be previous, and (3) it must be in writing. If these conditions are fulfilled the requirements of the section are complied with. No particular form is requisite.

PURSHOTAM v. HARBHAIJI ... (1902) 33 Bom. 413

HIGH COURT'S DISCIPLINARY JURISDICTION—*Pleaser—Mistake—*  
*Suspension of Sentence—H. M. v. P. Regulation II of 1872, Sec. 55*

See PLEADER ... 232

HIGH COURT RULES, RULE 140—*Petition—Taking Matter—Solicitors' retainer denied—Taxation of costs* [An attorney can obtain an order in taxation of his costs although he knows that his client disputes the retainer as to the whole bill.]

*In re Jones* (1857) 33 Ch. D. 106, followed.

*In re MADHAVJI* ... (1904) 33 Bom. 677

HINDU LAW—*Adoption—Adoption by a widow—Alienation by the widow prior to the date of adoption—Right of the adopted son to dispute the alienation* [Where a Hindu widow, who has inherited her husband's property, adopts a son, the adoption has the effect of divesting her of the property and putting an end to her estate as heir of her husband. The adoption has the same effect as her death with this difference that after the adoption she has a right of maintenance against the adopted son during the rest of her life. But the right of maintenance so long as it is not a charge on the estate or any portion of it, does not confer on her any right to the estate or entitle her to transfer it by way of sale or mortgage.]

Thus if a widow, before the adoption, from and transfers it to a stranger, binding the estate absolutely according speaking, must cease to have any effect operate during the time that the estate was represented by her as a result of the adoption is to terminate that estate.

*Lakshman v. Radhabai* (1897) 11 Bom. 603 and *Moro v. Balaji* (1895) 13 Bom. 809, followed. *Sreenivasa v. Krishnamma* (1902) 23 Mad. 143, not followed.

RAMAKRISHNA v. THEUPADAI ... (1903) 33 Bom. 283

—*Adoption—Adoption of a married man having a son—The son's gotra and rights of inheritance in the family of his birth* [When a married man does not like his father lose the birth and does not acquire of the family into which his

In the absence of any special custom, Jains are governed by the ordinary Hindu law.

KALGAUDA TAVAYAPPA v. SONAPPA TAMANGAUDA ... (1903) 33 Bom. 619

—*Debts—Son's liability to pay father's debts—Attachment of son's share in family property—Father's power to deal with the attached share—Civil*

*Procedure Code (Act XIV of 1882), sec 376* ] When the right, title and interest  
 have been attached in execution of a  
 decree has been prohibited by an  
 order of Civil Procedure, his father is  
 interested in satisfaction of his own  
 debts

SUBBAYA v NAGAPPA ... (1908) 33 Bom 264

HINDU LAW—*Joint Hindu family—Release by a coparcener—Right of coparcener's*  
 father in  
 of this  
 partition  
 is joint  
 rationally,  
 son to

*Held*, that the second son was not entitled to any share in the property.

SHIVAJIRAO v VASANTIPAO ... (1908) 33 Bom. 247

—*Marriage—Sura form—Brahma form—Construction of texts*]  
 he is given  
 transaction  
 it is called  
 The fact  
 not taken to  
 girl. The  
 rido for him

It is a principle enunciated by Viswaneshwara that where all *amritas* are of  
 equal importance and where there is a conflict between two or more writs, the  
 Court is free to choose any it likes

CHUVILAL v SURAJRAM ... (1909) 33 Bom 477

—*Mitakshara—Adopted son—Succession to the adopted son—Adoptive*  
*mother entitled to succeed in preference to adoptive father* ] Under the Mitakshara  
 school of Hindu law the adoptive mother is entitled to succeed in preference to  
 the adoptive father, to a son taken in adoption.

ANANDI v HARI SUBA ... (1909) 33 Bom. 494

—*Execution of decree—Action on decree—Execution of decree*  
 of decree  
 execution  
 tion Act  
 other of  
 executed  
 that has  
 poses of  
 d if the  
 of his  
 can do

*Umed Hathising v Goman Bhasia* (1895) 20 Bom. 333 followed.

There is no substantial distinction, in regard to questions arising in execution,  
 between the position of legal representatives added as parties to the  
 suit before decree and legal representatives brought in after decree. All

questions between them and the decree holder relating to execution must all be disposed of under section 214 of the Civil Procedure Code (Act XIV of 1902).

Where some of the parties to a decree appeal against it the decree in appeal is the final decree for the purpose of execution with respect to all the parties.

SHIVRAM v. SAKHARAM ... (1905) 33 Bom 53

**HINDU LAW—Mistakars—Orphan—Succession—Competition between husband and step-son.]** Under the Mistakars a head of Hindu law, when a married Hindu woman dies leaving no issue, her husband is entitled to succeed to her estate in preference to her husband's son by another wife.

BHIMACHARYA v. RAMACHARYA ... (1900) 31 Bom 152

**Panchals—Kharbars—Sub-divisions of Hindu tribe—Inter-marriage valid—Custom as to illegitimacy—Burden of proof.]** A marriage between a man of the Panchal caste and a woman of the Kharbar caste is valid. The Panchals and the Kharbars are sub-divisions of the Hindu tribe.

The onus lies upon the party alleging an illegitimacy by reason of immemorial custom to prove such prohibiting custom.

*Inderan Lalungpoo v. Titer v. Ramaswamy Pandit Talwar* (1890) 13 Moo I A 141 and *Sikerganda v. Ganga* (1896) 22 Bom 277, followed.

MAHANTAWA v. GANGAWA ... (1902) 33 Bom 693

**Widow—Gift of a s. a. by first husband as a portion to widow after her re-marriage—Hindu Widow Remarriage Act (XV of 1856) sec. 2, 3, 4 and 6.**

*See* ADOPTION ... 167

**Widow—Maintenance—Husband paying her husband's property in her hands—The property sufficient to maintain her for some years—Suit for declaration and for arrears of maintenance—Premature exit.**

*See* MAINTENANCE ... 60

**HINDU WIDOW REMARRIAGE ACT (XV OF 1856) sec. 2, 3, 4, AND 6—**

*That ... of Act XV of 1856, sec. 2, 3, 4, AND 6—*

*... of Act XV of 1856, sec. 2, 3, 4, AND 6—*

*Panchappa v. Sanganbasawa* (1890) 24 Bom. 69, considered.

POTLABAI v. MAHADU ... (1905) 33 Bom 107

**HYPOTHETICAL BUILDING SCHEME—Market value—Mode of valuation when no recent sales—Compensation—Land Acquisition Act (I of 1894), sec. 18**

*See* LAND ACQUISITION ACT ... 325

*... and to be acquired on sales of lands auction and pro-*

*See* LAND ACQUISITION ... 28

INHERENT POWERS— <i>Jurisdiction—Power of High Court to restrain by injunction a person from proceeding with a suit in the Court of Bombay filed in the High Court with a suit filed in the High Court matter pending</i>	1
<i>Jasramdas v Zimontal</i> (1903) 27 Bom. 357, not followed.	
UDERAM KESARI v. HYDERALLY	(1903) 33 Bom. 469
See BOMBAY MUNICIPAL ACT	331
Power of High Court to restrain by injunction a person from proceeding with a suit in the Small Causes Court— <i>Jurisdiction</i>	
See JURISDICTION	469
Suit for declaration and consequential relief— <i>Fulastion—Court-fees—Jurisdiction—Value of the relief stated in the plaint—Suits Valuation Act (VII of 1887), sec 8</i>	
See SUITS VALUATION ACT	307
INSOLVENCY ACT, INDIAN (11 AND 12 VICT. c 21), SECS 7, 20 AND 26— <i>Insolvent's property at Shanghai—Property of insolvents at Shanghai vests in Official Assignee of the Firm at Bombay—Court can order at Shanghai] The firm of M. subsequently swore his</i>	
On 16th March 1907 certain creditors of the firm obtained an order directing M to appear before the Court of Insolvent Debtors at Bombay to be examined under section 36 of the Indian Insolvency Act	
A Rule nisi was obtained on behalf of M calling upon the opposing creditors to show cause why the above order should not be set aside	
These creditors also obtained a Rule nisi calling on M to show cause why he should not deliver up to the Official Assignee goods belonging to the insolvent firm in his possession at Shanghai	
These two Rules were heard together	
Held, that the property of the insolvent debtors' firm in Shanghai vested in the Official Assignee of the Insolvent Debtors' Court at Bombay, and that Court could order M to hand over such property to the Official Assignee in Bombay	
Held, further, that the Insolvent Debtors' Court at Bombay can order the examination of a witness at Shanghai, but cannot direct a witness to come to Bombay to be examined, there being no machinery for that purpose.	
IN RE NAKHOJI SORABJI TALATI	(1908) 32 Bom. 402



section 7, clause (iv) (b) of the Court Fees Act, 1870, and section 8 of the Suits Valuation Act, 1887, and returned the plaint for presentation in the Court of the Second Class Subordinate Judge

*Held, reversing the orders that the suit fall within the jurisdiction of the First Class Subordinate Judge.*

DAGDU v TOTARAM ...

JURISDICTION—Dispute as to precedence or privilege between purely religious functionaries—Civil Procedure Code (Act XIV of 1892), sec 11  
See CIVIL PROCEDURE CODE ... 278

Insolvent's ...  
... is on to examine insolvent at Shunghas—  
Insolvency Act (11 and 13 Vict., c 21), secs 7, 20 and 36  
See INSOLVENT ACT (INDIAN) ... 462

Land Acquisition Act (I of 1894)—Assistant Judge hearing a claim—Value of the claim under Rs 5,000—Appeal lies to District Court and not to High Court—Practice and procedure—Bombay Civil Courts Act (XIV of 1860), sec. 16

See BOMBAY CIVIL COURTS ACT ... 371

Pakki Adat Agency—Place of payment ...  
Adatya—Custom] A, a Bombay ...  
on the pakki adat system On k sin  
contracts at Akola On an ...

... in the case of Pakki Adat agency primarily the place of payment is the place where the constituent resides, but payment should be made in any other place if the constituent has chosen to give directions to that effect and that the High Court at Bombay had jurisdiction to try the suit

Per CHANDAPARKAR, J. —A pakki adatya's liability ceases when hard cash has come into the hands of his constituent

KEDARNATH P. SURAJMAL

Power of ... (1900) 33 Bom 564

injunction a person from  
in High Court of Bombay  
adant in a suit filed in the  
at Bombay with a suit

... or from filing further suits relating to the same subject  
matter pending the hearing of the High Court suit

Jairamdas v Zamonlal (1903) 27 Bom. 357, not followed

UDERAM KESARI v HYDERALLY

Small causes suit—Suit brought in the Court of the First Class Subordinate Judge having small cause powers—The Subordinate Judge on privilege leave—Charge of the Court in Joint Second Class Subordinate Judge of the suit by the First Class Subordinate Judge as a regular suit—Trial a small cause ... (1908) 33 Bom 460



section 7, clause (iv) (b) of the Court Fees Act, 1870, and section 8 of the Suits Valuation Act, 1887, and returned the plaint for presentation in the Court of the Second Class Subordinate Judge

*Held*, reversing the orders that the suit fell within the jurisdiction of the First Class Subordinate Judge.

DAGDU v TOTARAY ... (1900) 33 Bom 639

JURISDICTION—Dispute as to precedence or privilege between purely religious functionaries—Civil Procedure Code (Act XII of 1882), sec 11

See CIVIL PROCEDURE CODE ... 278

Insolvent's property at Shanghai—Property of insolvents at Shanghai vests in Official Assignee of the Insolvent Debtors' Court at Bombay—Court can order insolvent at Shanghai to hand over property to Official Assignee in Bombay—Court can order commission to examine insolvent at Shanghai—Indian Insolvency Act (11 and 13 Vict, c 21) secs. 7, 26 and 30

See INSOLVENCY ACT (INDIAN) ... 462

Land Acquisition Act (I of 1894)—Assistant Judge hearing a claim—Value of the claim under Rs 5,000—Appeal lies to District Court and not to High Court—Practice and procedure—Bombay Civil Courts Act (XIV of 1860), sec. 16

See BOMBAY CIVIL COURTS ACT ... 871

Pakk Adat Agency—Place of performance of contract by Pakk Adatya—Custom [ K, a Bombay merchant employed S as his agent at Akola on the pakk adat system contracts at Akola. On account of a contract found to be due from S to I High Court at Bombay had no jurisdiction to hear the suit on the ground that no part of the cause of action had arisen in Bombay

*Held* in the case of P v I ... the place of payment is the place where the debt is to be made in any other way to that effect and that the

Per CHANDRASEKHAR, J. —A pakk adatya's liability ceases when his cash has come into the hands of his constituent

KEDARNATH v. SURAJMAL ... (1900) 33 Bom 561

Power of High Court to restrain by injunction a person from proceeding in the High Court of Bombay—The High Court of Bombay has jurisdiction to grant an injunction in a suit filed in the High Court at Bombay with a suit to which the suit in the High Court is related to the same subject matter pending the hearing of the High Court suit

Jayramdas v Zamonlal (1903) 27 Bom. 357, not followed

UDERAM KESAJI v HYDERALLY ... (1908) 33 Bom 460

Small causes suit—Suit brought in the Court of the First Class

A suit of the nature of a small  
Class Subordinate Judge who had ex-  
tion he was on privilege leave an

his return from leave the First Class  
The question arising whether

*Held* that the First Class Subordinate Judge continued to be a Judge with  
Small Cause Court powers during his absence on leave and the entering of the suit  
in the file of regular suits could not take it away from the category of small  
causes nor could the fact that the Subordinate Judge tried the suit under his  
ordinary jurisdiction deprive it of its character as a small cause.

NARAYAN RAVJI v GANGARAM RATANCHAND (1909) 33 Bom 661

JURISDICTION—*Suit for declaration and consequential relief—Valuation—Court  
fee—Value of the relief stated in the plaint—Suits Valuation Act (VII of 1877),  
sec 8*

See SUITS VALUATION ACT ... 307

—Tipnis Pansare right—Right to levy toll on exports of paddy  
from foreign territory—Such a right is nibandha under Hindu law—The right  
is immovable property—*Suit to enforce the right in British Courts*] The plaintiff  
sued to recover from the defendant a certain sum of money on account of  
and known as the Tipnis Pansare  
ry of the Pant Sach v to Pen, with  
cause of action arose admittedly in  
suit by in the British Courts because

*Held* overruling the contention, that what the plaintiff claimed was an allow-  
ance granted by the Peshwa in permanence and such an allowance whether  
secured on land or not, being according to Hindu law, nibandha, was immove-  
able property

The Collector of Thana v. Hirs Sitaram (1892) 6 Bom 546, followed

*Held*, further, that this immovable property was situate, in the eye of law,  
in a foreign state, and that the British Court had no jurisdiction to try a suit  
for the determination of a right to or interest in the property, when the right  
was denied

Keshav v Vinayal (1897) 23 Bom 27, applied

KRISHNAJI v GADANAN

(1909) 33 Bom. 373

JURY, TRIAL BY—*Trials with the aid of assessors—Difference in the mode of trial  
—Accused if possible can complain—Practice—Procedure—Criminal Proce-  
dure Code (Act I of 1895) sec 209*

See CRIMINAL PROCEDURE CODE ... 423

KURBAES—*Panchais—Sub-divisions of Shudra tribe—Inter-marriages valid—  
Custom as to illegality—Burden of proof—Hindu law*

See HINDU LAW ... 693

LAND ACQUISITION ACT (1 OF 1894) - Assistant Judge hearing a claim - Value

The value of the land to the owner is what must be regarded, and that is the price which it will fetch if disposed of on most profitable terms. The owner is not to be deprived of the most advantageous way of selling his land by reason of the fact that it is subject to immediate acquisition. If the sale of the land in building sites is impossible except through the speculator, then, no doubt, allowance will have to be made for the profits, costs and other charges of the speculator. But the claimant is not to be debited with these expenses unless the introduction of the speculator is a commercial necessity. And there is no necessary reason why the claimant should be driven to have recourse to the speculator for a business which he can do for himself.

roadway

Where the method of hypothetical development is employed for assessing compensation in conjunction with the method of ascertaining the present value of the land by reference to the prices realised by the sale of neighbouring lands, the greater degree of development is itself

corroborated

In the method of arriving at a valuation of land by reference to prices realised by sales of neighbouring lands, it is shown that no evidence of former sales in the

TRUSTEES FOR THE IMPROVEMENT OF THE CITY OF BOMBAY (1908) 23 Bom 23

LAND ACQUISITION ACT (1 OF 1894) - Assistant Judge hearing a claim - Value of the claim under Rs 5000 - Appeal lies to District Court and not to High Court - Jurisdiction - Practice and procedure - Bombay Civil Courts Act (XIV of 1869), see 16

See BOMBAY CIVIL COURTS ACT ... 371

properly have been detected

being at the sales of the of similar

neighbourhood.

It would be the property

lending could in one lot it in lot

ask for proof either what the property is or its value if he plotted out

# GENERAL INDEX

Where no evidence has been adduced of sales in the

Court can be guided by the opinions of surveyors. It is necessary to distinguish opinion from argument.

The question which has arisen is whether the evidence is good evidence.

When determining the value of frontage land the depth is a question of supreme importance. What is a suitable depth must primarily depend on the character of the buildings in the locality.

It cannot be too clearly laid down that under ordinary circumstances the value of an income producing property depends on its income irrespective of the cost; and that capital when once invested in land and buildings cannot be separated between them so as to give the market value of each.

It cannot be taken as a hard and fast rule that back land must be worth half the frontage land.

*PER CURIAM*—"Evidence of hypothetical building schemes is irrelevant to the question of finding the market value of land. The belief that a hypothetical scheme can be a guide to market values ascertained by other means is equally fallacious."

The Court would be slow to differ from the Collector's offer on a matter of a few rupees except for very strong reasons such as an error on a question of principle.

IN THE MATTER OF KAHIM TAR MAHOMED . . . (1909) 33 Bom. 32

**LAND ACQUISITION ACT (1 OF 1894), SEC 23—"Market value of land"**  
*Methods of assessing the market value—Correct methods laid down—City of Bombay Improvement Act (Bom Act IV of 1898)—Valuation by Collector—Acquisition of interest by claimant after Collector's award—Refusal of Tribunal of Appeal—Consolidation of parcels—Acting on behalf of the Improvement Act (Bombay Act IV of 1898) At the date of land in December 1898. At the date of the parcels, was in unencumbered possession of only one of them, and the remaining parcels were in the possession of others.*

the Tribunal of Appeal for is allowed. The Tribunal of whole land on a quarrying bidation was wrongly allowed m—namely the claim to the quarrying value—which claimants have been able to make.

*Held*, that the correct value of the land was ascertained by the Collector. It was enabled to put claim was already before had to be decided the land made by the Collector

*Held*, further, that compensation should not be assessed on a quantum basis for the land was never a marketable quarry at the material time and did not become so till after the Collector had made his award

*Per BATCHELOR J* —For the purposes of ascertaining the market value of land under section 23 of the Land Acquisition Act (I of 1894) the Court must proceed upon the assumption that it is the particular piece of land in question that has to be valued including all interests in it.

*Collector of Belgaum v. Dhimrao* (1908) 10 Bom. L. R. 657, followed

The method contemplated by the Land Acquisition Act (I of 1894) for assessing compensation is that of ascertaining first the market value of the land as if all separate interests combined to sell and then of apportioning that value among the persons interested. The 'market' value of the land means the price which would be obtainable in the market for a concrete parcel of land with its particular advantages and its particular drawbacks both advantages and drawbacks being estimated rather with reference to commercial value than with reference to any abstract legal rights.

*Per HEATON J* —Taking the and its words it seems that in either the method of valuing or of valuing the land as a whole the share of the

reasonable at by taking consideration Collector to ascertain opinion do

*Dhimrao* (1908) 10 Bom. L. R. 657

1st of 1904

two methods of Collector of Belgaum v

BOMBAY IMPROVEMENT TRUST v JALUNOY

(1909) 33 Bom. 493

**LEASE**—*Lease unregistered when admissible in evidence*—*Conduct of parties to lease*—*Collateral purpose*—*Transfer of Property Act (I of 1882), sec 107*—*Lien*—*Charge*—*Assignment*]. Where a lease which requires registration is not registered it cannot be put in evidence. But if the parties to it have acted upon its terms whatever they were or if a certain course of conduct has been pursued by either party to it, the lease is admissible in evidence. The conduct of landlord and tenant between them, the payment of rent by the tenant, the performance of certain obligations by the tenant, the payment of money by the tenant to recover the money so deposited may give the lease in evidence for the purpose of proving his right to recover the deposit.

1st of

1st of 1882 or proving a money debt arising from the conduct of the parties

*Pullbrook v. Lawes* (1876) 1 Q. B. D. 284 referred to

Section 107 of the Transfer of Property Act does not say that if the parties without any such instrument (i.e., a lease) conduct themselves towards each other

as if they were landlord and tenant and moneys pass from one to the other in aid in a case the exists, 123 and

*Cornish v Abington* (1809) 4 H & N. 549, referred to

charge  
the first  
charge on  
have no  
debtor,  
in law is

*ADESIK BEJONJI v SYED SIRDAR ALI KHAN*

... (1909) 33 Bom 610

**LEASE**—*Mortgage with possession—Lease to mortgagor—Death of the mortgagee and his surviving undivided brother—Sister entitled as heir—Possession and management by mortgagee's widow—Payment of the rent by the tenant in good faith to mortgagee's widow—Suit by sister for recovery of rent—Assignment by lessor not necessary—Transfer of Property Act (IV of 1882), sec 50.*

See TRANSFER OF PROPERTY ACT

... 96

———*Salt pans—Lease under a license from Collector—Lessee not to sub let without Collector's permission—Sub lease by the lessee without such permission—Deposit by sub lessee with lessee—Illegal contract—Suit by sub lessee to recover deposit cannot lie—Salt Act (Dom Act II of 1890) secs 11 and 47.*

See SALT ACT

... 636

**LEAVE TO APPEAL TO PRIVY COUNCIL**—*Joinder of charges—Criminal Procedure Code (Act I of 1898), secs 233, 234, 235, 236, 237 and 239—Practice*

See CRIMINAL PROCEDURE CODE

... 221

**LICENSE**—*Salt pans—Lease under a license from Collector—Lessee not to sublet without Collector's permission—Sub lease by the lessee without such permission—Deposit by sub lessee with lessee—Illegal contract—Suit by sub lessee to recover deposit cannot lie—Salt Act (Dom Act II of 1890) secs 11 and 47*

See SALT ACT

... 633

**LIEN**—*Charge—Assignment—Transfer of Property Act (IV of 1882), sec 107—The mere fact that parties have described a transaction as a "lien" or "charge" cannot*

*ADESIK BEJONJI v SYED SIRDAR ALI KHAN*

... (1908) 33 Bom 610

———*Tendor's lien for unpaid purchase money—Sale deed containing acknowledgment of receipt of - - - - - gags without notice of 1872), sec. 115—Trans*

See TRANSFER OF PROPERTY ACT

... 53

**LIMITATION**—*Bhagdari Act (Dom Act I of 1882), sec 3—Bhag—Unrecognized sub-division of a bhag—Alienation—Suit to set aside the alienation.] Possession acquired under an alienation made in contravention of section 3 of the*



Bhagdari Act (Bombay Act V of 1862) can become adverse so as to bar a suit for recovery by the individual alienor or his representatives in interest

The Bhagdari Act (Bombay Act V of 1862) contains nothing which by express provision or necessary implication abrogates the law of limitation in favour of a private person

*Dala v. Parag* (1902) 1 Bom L R 797 and *Jethabhai v. Nathabhai* (1904) 23 Bom 399, distinguished

ADAM UMAR v. BAPU BAWAJI ... .. (1908) 33 Bom 116

LIMITATION ACT (XV OF 1877), *sch. II, art 127*—*Suit by a Mahomedan daughter to recover her share in her deceased father's property—Limitation* [Article 127, Schedule II of the Limitation Act (XV of 1877) applies to a suit by the daughter of a deceased Mahomedan to recover her share in his property]

*Sayad Gulam Hussain v. Dibi Amarnisa P J.* 1885, p 170, followed

BOO FATMA v. BOO GHISANBOO ... .. (1909) 33 Bom 710

ART. 178—*Hindu law—Mitakshara—Liability of sons to pay father's debt—Money decree—Appeal by some of the parties to a decree—Decree in appeal final—Execution—Civil Procedure Code (Act XIV of 1882), secs 234, 244, 252*

See HINDU LAW ... .. 39

MAHOMEDAN, SUIT BY—*Limitation Act (XV of 1877), sch II, art 127* ... 710

See LIMITATION ACT ... ..

*or husband's property in her or some years—Suit for declaration* [The plaintiff, a Hindu

widow, filed a suit to recover arrears of of her right to maintenance At the time be in possession of a fund belonging to was sufficient to provide for her maintenance the lower Court

*Held*, that no cause of action had accrued to the plaintiff At the date when the suit was brought, the Court was not in a position to forecast events or to anticipate the position of affairs five years later

DATTATRAYA WAMAN v. BUKHABAI ... .. (1908) 33 Bom 50

MARKET VALUE OF LAND—*Methods of assessing the market value—Correctment Act (Bom Act IV of 1898)—Interest by claimant after Collector's appeal—Consolidation of references—*

See LAND ACQUISITION ACT ... .. 483

bourhood

IN THE MATTER OF KAHIM TAR MAHOMED ... .. (1908) 33 Bom 326

MARRIAGE—*Aura form—Brahma form—Construction of texts—Hindu law.*

See HINDU LAW ... .. 483

**MARRIAGE**—*Panchale—Kurbars—Sub-divisions of Shudra tribe—Inter-marriage valid—Custom as to illegality—Burden of proof—Hindu law.*

See HINDU LAW ... .. 62

**MATERIAL IRREGULARITY**—*Redemption suit—Sale really a mortgage—*  
*of 1875 not off. 1875*  
*of suit—But all not*  
*providing Code (1875)*  
*Act of Act (X) II*

See CIVIL PROCEDURE CODE ... .. 722

See NEGLIGENCE ... .. 273

See CRIMINAL PROCEDURE CODE ... .. 77

# **PARTIES.**

See CIVIL PROCEDURE CODE ... .. 273

**MITAKSHARA**—*Liability of sons to pay father's debt—Hindu law.*

See HINDU LAW ... .. 29

**MONEY-DECREE**—*Execution—Attachment and sale of property*

See CIVIL PROCEDURE CODE ... .. 311

**MORTGAGE**—*Transfer of Property Act (IV of 1882), sec. 50—Mortgage with*

*possession—Lease to mortgagor—Death of the mortgagor and his surviving management by mortgagor's to mortgagor's not necessary] certain property years. subsequently mortgagor's interest as mortgagor survived to his undivided brother Ramkrishna. Ramkrishna died in the year 1901 and thereafter possession and management of the property was taken by Sobraja's widow Gowri. She got her name placed on the khata as owner of the property and recovered rent from the tenant for the years 1902 and 1903*

*Held, that the defendant was not chargeable with rent sued for Section 50 of the Transfer of Property Act (IV of 1882) was applicable inasmuch as defendant in making the payment to Gowri acted in good faith and*

of the plaintiff's interest in the property. The language of the section is general and no assignment by the lessor during the tenancy was necessary

KAVERIAMMA V. LINGAPPA

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(1908) 33 Bom. 98

# SEE TRANSFER OF PROPERTY ACT

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11

## MORTGAGOR AND

of property which  
previously with inc  
gate title—Credito

to the title deeds

duary legatees of his will directing them to carry on the business. After their father's death the elder sons in the course of their business transactions became indebted to the Bank of Bombay in respect of advances by the Bank, to secure which, on 13th September 1890 (two of the younger sons being then minors), the

was indicated, and had the Bank made inquiry and they would have been put upon inquiry and charge created on the property by the will. In a suit brought by mortgagors to establish the latter pleaded that they were bona fide

*Held* (upholding the decision of the High Court) that under the circumstances

with, namely, residuary legatees

*In re Queale's Estate* (1886) Ir. L. R. 17 Ch. D. 361 at p. 368, followed

*Held* also, that the plaintiffs being legatees the Bank took the property subject to the charge upon it created by the will. Distinction drawn between the creditors and legatees in such a case. *Spence's "Equitable Jurisdiction,"* Vol. II, page 376, referred to

By the terms of the will the legacy was to be made up and paid within six years after the testator's death which expired in 1891, and the mortgage was not

*Held* that, although in cases of this kind delay was a circumstance to be taken into consideration yet having regard to the fact that two of the plaintiffs were still minors when the title deeds were deposited with the Bank, and that con-

tinued possession by the executors and mortgagors was not inconsistent with the purposes of the will, the rights of the parties were unaffected by that circumstance

DANK OF BOMBAY : SULEMAN SOMJI ... (1908) 33 Bom 1

**MUKTAD CEREMONIES**—*Trusts to perform Muktd ceremonies, validity of—Tenets of Zoroastrian faith—Nature and meaning of Muktd Ceremonies—Ceremonies tending towards the advancement of religion—Practice—How far decision by single Judge binding on his successors*] Trusts and bequests of lands or money for the purpose of devoting the income thereof in perpetuity for the purpose of performing Muktd Bij, Yezashni, and other like ceremonies, are valid "charitable" bequests, and as such exempt from the application of the rule of law forbidding perpetuities

The Farvardigan days are the most holy days during the Zoroastrian year and the performance of Muktd ceremonies during the Farvardigan days is enjoined by the Scriptures of the Zoroastrian religion

The performance of the Muktd ceremonies is a religious duty imposed on the Zoroastrians by the proved tenets of the religion they profess

The ceremonies themselves are acts of religious worship. They include worship, praise, and adoration for the Supreme Deity, and a thanksgiving for all his mercies

The moneys paid to the priests for the performance of the Muktd ceremonies forms a good portion of their ordinary income. The priests make a higher

According to the belief prevailing amongst the faithful followers of the Prophet Zoroaster, the performance of the Muktd ceremonies confers public  
amongst whom  
The fund-  
ers addressed

to the great extent.

follow the judg-  
d down certain  
provisions of the  
bound to follow  
y him, when the  
may be fuller or

*Limsi Navroji Bantys v Bantys Bantys Limsi Navroji* (1887) 11 Bom. 441,  
not followed.

JAMSHEDJI C TARACHAND : SOONABAI ... (1907) 33 Bom. 122

**MUNICIPALITY**—*Clerk in the cess collection department of a District Municipality—Bombay District Municipal Act (Bom Act III of 1901)—Public servant—Obstruction to a public servant—Penal Code (Act XLV of 1860) sec 21, 18*

See PENAL CODE ... 210

**MUNICIPALITY**—*The Municipality not keeping a ditch and sluices at a dam in proper order—Collection of the storm water in the ditch—The water passing over lands of another and doing damage—Nuisance—Negligence.*

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See NEGLIGENCE .....

**NEGLIGENCE**—*Municipality—The Municipality not keeping a ditch and sluices at a dam in proper order—Collection of the storm water in the ditch—The water passing over lands of another and doing damage—Nuisance* } The plaintiff sued to recover damages from the defendant Municipality for injury done to his property by storm water. The water had collected in an adjoining ditch which the Municipality had not kept in a state of repair, but had allowed it to be choked with the rubbish of the town creek.

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*Borough of Dalhurst v Macpherson (1879) 4 App Cas 256 followed*

**RAJENDRALAL v SURAT CITY MUNICIPALITY**

(1908) 83 Bom 393

**NIBANDHA**—*Typhis Pansare right—Right to toll as exports of goods from foreign territory—Such a right as not in the power of the State—The right is immovable property—Suit to enforce the right in British Courts—Jurisdiction*

372

See JURISDICTION

**NOTICE**—*Mortgagee's notice—Mortgagee by executors and residuary legatees of testator—Mortgagee's notice—Mortgagee's omission to interest will—Expense of time between testator's*

See MORTGAGE AND MORTGAGEE .....

1

**SERVICE OF**—*Contempt of Court—Notice of motion for committal—Personal service necessary—Service upon attorneys not sufficient* } Where an application is made for committal of a person to jail for disobedience of the Court's order it is necessary not only that the order should be served upon the defaulting party personally but the notice to commit should also be similarly served upon him. Service upon the party's attorneys is not sufficient.

**BAI MOOLCHAL v CHIT**

630

by storm  
which the Municipality  
choked with the rubbish  
creek but allowed the sluices at the dam to be choked up with weeds, sedges and  
silt. The consequence was that the storm water which had collected in the creek  
passed on to the plaintiff's land and did damage.

Held that there was nuisance on the part of the Municipality, for they had turned their works by their negligence into a nuisance so as to throw the water

collected on their property—the creek—on to the plaintiff's land, and that, therefore, they were liable for the damage caused thereby

*Borough of Bathurst v Macpherson* (1879) 4 App Cas 256, followed

RAJENDRALAL v SUBAR CITY MUNICIPALITY ... (1908) 33 Bom 393

OFFICIAL ASSIGNEE—*Insolvent's property at Shanghai—Property of insolvents*

See INSOLVENCY ACT (INDIAN) ... 462

ONUS—*Hindu law—Panchals—Kurbars—Sub divisions of Shudra tribe—Inter-marriage valid—Custom as to illegality* ] A marriage between a man of the Panchal caste and a woman of the Kurhar caste is valid. The Panchals and the Kurbars are sub divisions of the Shudra tribe

The onus lies upon the party alleging an illegality by reason of immemorial custom to prove such prohibiting custom

*Inderun Valungypoolj Taver v Ramasawmy Pandia Talaver* (1869) 13 Moo. I A 141 and *Fukirgauda v. Gangi* (1896) 22 Bom 277, followed.

MAHANTAWA v GANGAWA ... (1909) 33 Bom 603

OUSTER—*Adverse possession—Adverse possession between tenants in common—What constitutes adverse possession—Acts of exclusive possession*

See ADVERSE POSSESSION ... 317

OWNERSHIP—*Suit for declaration of ownership—Plaintiff's title proved—Defendant's title found to be not inconsistent with plaintiff's ownership—Presumption—Possession goes with title—Adverse possession* ] Plaintiff sued for a declaration that he was the owner of the land in suit alleging that the defendant had taken wrongful possession thereof. It was found as a fact that the title to the land was in the plaintiff and that the defendant had made no permanent use of the land inconsistent with its being plaintiff's land

Held that plaintiff was entitled to succeed. The said circumstances made out a case for the application of the presumption that possession goes with title

*Runcet Ram Panday v Goburdhun Ram Panday* (1873) 20 W R 20 (Lr. Itul) and *Agency Company v. Short* (1888) 13 App Cas 793, followed

*Framys Cursetys v Gokuldas Madhows* (1892) 16 Bom 338, referred to

GANPATI v. RAOHUNATH ... (1909) 33 Bom 712

PAKKI ADAT AGENCY—*Place of performance of contract by Pakki Adatya—Custom—Jurisdiction* ] K, a Bombay merchant, employed S as his agent at Akola on the pakki adat system. On K's instructions S entered as his agent into

Held in the case of Pakki Adat agency primarily the place of payment is the place where the constituent resides, but payment should be made in any other place if the constituent has chosen to give directions to that effect and that the High Court at Bombay had jurisdiction to try the suit.

*Per CHANDLAKER J.*—A pakki adatya's liability ceases when hard cash has come into the hands of his constituent

KEDARMAL v SURJMAL ... (1903) 33 Bom 221

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See NEGLIGENCE

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therein, but were liable for the damage caused thereby

*Borough of Baku, et v. Macpherson* (1879) 1 App Cas 256, followed

RAJENDRALAL & SURAT CITY MUNICIPALITY

(1908) SJ Born 293

**NIBANDHA**—*Tipsa* Passure right—flight to levy toll on exports of goods from foreign territory—Such a right is nibandha under Hindu law—The right is immovable property—Suit to enforce the right in British Courts—Jurisdiction

*See JURISDICTION*

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NOTICE—

See MORTGAGOR AND MORTGAGEE ...

**SERVICE OF—Contempt of Court—Notice of motion for committal—**  
*Personal service necessary—Service upon attorneys not sufficient* } Where an  
 application is made for committal of a person to jail for disobedience of the  
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Bai MOOLBAI v. CHUNILAL PITAMBER

(1909) 33 Bsm 630

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RAJENDRALAL v SUBAR CITY MUNICIPALITY ... (1908) 33 Bom 393

OFFICIAL ASSIGNEE—*Insolvent's property at Shanghai*—*Property of insolvents at Shanghai rests in Official Assignee of the Insolvent Debtor's Court at Bombay*—*Court can order insolvent at Shanghai to hand over property to Official Assignee in Bombay*—*Court can order commission to examine insolvent at Shanghai*—*Indian Insolvency Act* (11 and 12 Vict, c 21), secs 7, 28 and 36.

See INSOLVENCY ACT (INDIAN) ... 462

ONUS—*Hindu law*—*Panchals*—*Kurbars*—*Sub divisions of Shudra tribe*—*Inter-marriage valid*—*Custom as to illegality*] A marriage between a man of the Panchal caste and a woman of the Kurbar caste is valid. The Panchals and the Kurbars are sub divisions of the Shudra tribe

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OUSTER—*Adverse possession*—*Adverse possession between tenants-in common*—*What constitutes adverse possession*—*Acts of exclusive possession*.

See ADVERSE POSSESSION ... 317

OWNERSHIP—*Suit for declaration of ownership*—*Plaintiff's title proved*—*De-*

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Per CHANDAPAKAR, J. —A pakki adatya's liability ceases when hard cash has come into the hands of his constituent.

KEDARNAL v SURAJMAL ... (1903) 23



PANCHALS— <i>Kurbars</i> —Sub-divisions of <i>Shudra</i> tribe—Inter marriage valid—Custom as to illegality—Burden of proof—Hindu law			
See HINDU LAW	..	..	693
PARSI RELIGION—Tenets of Zoroastrian faith—Trusts to perform <i>Muktad</i> ceremonies, validity of—Nature and meaning of <i>Muktad</i> ceremonies—Ceremonies tending towards the advancement of religion			
See MUKTAD CEREMONIES	..	..	121
PARSIS—Conversion among Indian Zoroastrians—Juddins—Convert not entitled to certain religious and charitable institutions of Parsis.			
See CHARITABLE TRUSTS	..	..	509
PARTIAL MISJOINDER OF—Lands situate at different villages and in possession			
See CIVIL PROCEDURE CODE	..	..	293
See COURT FEES ACT	..	..	267
See COURT FEES ACT	..	..	618
PENAL CODE (ACT XLV OF 1860), SECS 21, 186—Public servant—Obstruction to a public servant—Clerk in the cess collection department of a District Municipality—Bombay District Municipal Act (Bom Act III of 1901) A clerk in the cess collection department of a District Municipality constituted under the Bombay District Municipal Act (Bom Act III of 1901) is a public servant within the meaning of section 21, clause 10 of the Indian Penal Code (Act XLV of 1860), and any obstruction offered to him in execution of his duties is an offence punishable under section 186 of the Code			
EMPEROR & BABULAL	..	(1903) 23 Bom	211
SECS 124A, 153A—Sedition—Promoting enmity, &c. between classes—Publication, what constitutes—Criminal Procedure Code (Act V of 1898) secs 225, 233, 234, 235, 236 and 237—Charges—Joinder of charges—Misjoinder of charges. The accused was charged at one trial with having committed offences punishable under sections 124A and 153A of the Indian Penal Code, on two charges one with respect to each of the two articles the <i>Hind Swarajya</i> . At the trial of the newspaper in Bombay, under the Press Act, and under the Criminal Procedure Code, as given in both the charges, the evidence was taken in appeal in Bombay, and			

*Held*, that the evidence on record was sufficient to prove the publication of the newspaper in Bombay.

*Held*, further, that the trial was not bad as there had been no misjoinder of charges.

EMPEROR v. TRIDHONANDAS . . . (1908) 33 Bom 77

PLACE OF PAYMENT—*Pakki Adat Agency—Place of performance of contract by Pakki Adatya—Custom—Jurisdiction*

See PAKKI ADAT AGENCY . . . 361

PLEADER . . .

purpose of bringing the administration of justice into contempt

GOVERNMENT PLEADER v. JAGANNATH . . . (1903) 33 Bom 252

PLEADER'S FEES—*Appeals in Probate Proceedings—Scale of costs—Act I of 1840, sec 7—Practice*

See PRACTICE . . . 250

POSSESSION—*Appointment of a Committee for management of property—Appointment acquiesced in by owner—Committee in management for a long time—Suit by Committee against a trespasser in ejectment—Title* } The Parsi Panchayat at Bombay appointed a Committee to manage the property of the Parsi Anjuman at Surat. The committee managed the property for a very long time—sixty years—with the authority and acquiescence of the Parsi Anjuman. Subsequently the defendant having trespassed on the property the Committee sued him in ejectment. The defendant contended that the plaintiffs had no right to sue for the recovery of the property as they were neither the owners nor the nominees of the Anjuman.

*Held*, that the plaintiffs being in possession for a long time with the authority and acquiescence of the owners, namely, the Parsi Anjuman at Surat, were entitled to recover possession from a trespasser.

JIVANJI JAMSHEDJI v. BARJORJI NAGESERVANJI . . . (1903) 33 Bom 499

—*Suit for declaration of ownership—Plaintiff's title proved—Defendant's use found to be not inconsistent with plaintiff's ownership—Presumption—Possession goes with title—Adverse possession*

See OWNERSHIP . . . 712

PRACTICE . . .

A Court of appeal is not justified in exposing a party after he has obtained his decree to the brunt of a new attack of which he had never had notice during the hearing of the suit.

NATHU PIRAJI v. UMEDMAL GADKHAL . . . (1903) 33 Bom 23

PRACTICE—Amendment of pleadings—Defence of the bar of limitation—Practice as to amendment of plaint—Civil Procedure Code (Act V of 1903), O VI, r 17  
See CIVIL PROCEDURE CODE . . . . . 614

—————Bombay Civil Courts Act (XIV of 1869), sec. 16—Land Acquisition Act (I of 1894)—Assistant Judge hearing a claim—Value of the claim under Rs. 5,000—Appeal lies to District Court and not to High Court—Jurisdiction  
See BOMBAY CIVIL COURTS ACT . . . . . 271

—————Criminal Procedure Code (Act V of 1898), sec. 239—Trial by Jury—modes of trial—Accused if were tried with a jury on Code), and with the aid of jurors as assessors on charges of rioting, grievous hurt and hurt (sections 147, 148, 326 and 323 of the Code) respectively

They were asked for their verdict on both the charges and trials He agreed with the verdict and not appealed

Held, that the law makes no distinction as to the procedure at all between a trial by a jury and one with the aid of assessors except as to the summing up in the case of the former and the manner in which the verdict in the former and the opinions of the assessors in the latter are respectively taken It is at this latter point that there is a departure of ways, and if the accused who is tried does not intervene at that crucial point, and get the procedure applicable to trials with the aid of assessors enforced, he cannot be heard to complain.

(1900) 33 Bom 423

ENTERQUE v MANSING

ought to have been incorporated in a decree when passed it was competent to the Court at any stage of proceedings to direct necessary inquiries or accounts to be made or taken.

decree by a person into existence order appealed

An appeal lies against an order of a Judge sitting on the Original Side if that order decides a question of some right between the parties

SIR JENABOIR COWASSI v THE HOPE MILLS, LIMITED . (1905) 33 Bom 216

—————How far decision by single Judge is binding on the parties

be available before a Judge in a later case may be fuller or more reliable and may tend to lead him to a different conclusion Page

JAMSHEDJI C TARACHAND v SOOVABAI

... (1907) 33 B. 122

**PRACTICE**—*Joinder of charges*—*Privy Council leave to appeal to, in criminal case* [Before granting a certificate for leave to appeal to the Privy Council, the Court must be satisfied that there is reasonable ground for thinking that grave and substantial injustice may have been done by reason of some departure from the principles of natural justice]

*Ex parte Carew* [1897] A. C. 719 and *Dinul v Attorney General of Zulu* land (1887) 61 L. T. 740 followed

*In re* BAL GANGADHAR TILAK ...

... (1903) 33 B. 221

*Lands situate at different villages and in possession of different persons under different titles*—*One suit to recover possession of the lands*—*Joinder of parties or causes of action*—*Interlocutory judgments against different defendants*—*Final judgment for possession to be reserved till the conclusion of the trial*—*Civil Procedure Code (Act XIV of 1833) sec 28,*

*See* CIVIL PROCEDURE CODE ...

... 293

*Rule allowing costs of two Counsel*—*Junior Counsel should not* ...

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d that in case of dispute  
arrangements for some

ESMAIL EBRAHIM v HAJI JAN MAHOMED ...

(1903) 33 Bom 475

*Taratu n*—*Pleader's fees*—*Appeals in Probate Proceedings*—*Scale of costs*—*Act I of 1846, sec 7* [The taxation of pleader's fees in appeals from probate proceedings should according to a long standing practice of the High Court of Bombay be valued at Rs 30]

SCANDRAI 1. THE COLLECTOR OF BELGAUM

... (1903) 33 Bom 256

**PRESUMPTION**—*Suit for declaration of ownership*—*Plaintiff's title proved*—*Defendants are found to be not inconsistent with plaintiff's ownership*—*Possession goes with title*—*Adverse possession*

*See* OWNERSHIP ...

... 712

**PRIVY COUNCIL**—*Leave to appeal to the Privy Council in criminal case*—*Practice*—*Joinder of charges*—*Criminal Procedure Code (Act V of 1893), sec 212*

*Ex parte Carew* [1897] A. C. 719 and *Dinul v Attorney General of Zulu* land (1887) 61 L. T. 740, followed

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... (1903) 33 Bom 221

**PROBATE**—*Appeals in Probate Proceedings*—*Pleader's fees*—*Taxation*—*Scale of costs*—*Act I of 1846, sec 7*—*Practice*

*See* PRACTICE ...

**PUBLIC SERVANT**—*Obstruction to a public servant—Clerk in the cess collection department of a District Municipality—Bombay District Municipal Act (Bom Act III of 1901)—Penal Code (Act XLV of 18 0), secs 21, 183*  
See PENAL CODE ... .. 213

**QUARRY**—"Market value of land —Methods of assessing the market value—Improvement Act (Bom Act IV of interest by claimant after Cl of Appeal—Consolidation of refences—Land Acquisition Act (I of 1891), sec 23.  
See LAND ACQUISITION ACT .. .. 483

**RAILWAYS ACT (IX OF 1890) SEC. 75, SCH II, CL (2)**—*Parcel containing articles liable to be insured and also not liable to be insured—Loss of the parcel as well as those not so liable. The parcel was lost in transit on the Southern Marathi Railway Line. The plaintiff thereupon sued the Railway Company to recover damages for the loss of the goods which were not liable to be insured. The defendant Company denied liability.*  
not liable. The words of section 75 of a distinct or between articles mentioned for packages in which they are contained stration shall not be responsible for the parcel or package  
(1509) 33 Bom 703

**PUNDALIK & S M RAILWAY COMPANY**  
ordinate Judge of a person to be appointed—*Appeal—Civil Procedure Code (Act XII*  
See CIVIL PROCEDURE CODE .. .. 101

**REDEMPTION SUIT**—*Sale really a mortgage—Sec 10A of the Deltian parties to lease—Collateral purpose —Transfer of Property Act (IV of 1882) s c 107—Lien—Charge—Assignment*  
agriculturists' Relief Act  
(XVII of 1879)  
See DEAKHAN AGRICULTURISTS RELIEF ACT ... 722

**REGISTRATION**—*Lease unregistered when admissible in evidence—Conduct of parties to lease— Collateral purpose —Transfer of Property Act (IV of 1882) s c 107—Lien—Charge—Assignment*  
See LEASE .. .. 610

**RELEASE**—*Relinquishment of claim by reversioner—Stamp*  
See STAMP .. .. 67

**RELEASE BY COPARCENER**—*Right of coparcener's afterborn son to claim a share with his brothers—Joint Hsi du family—Hindu law*  
See HINDU LAW ... .. 267

**RELIGIOUS PRIVILEGES**—*Shankaracharya of Sharada Math plaintiff—Shankaracharya of Dholka, defendant—Dispute as to precedence or privilege*



[illegible]

*Held*, that the document was only liable to stamp duty as a transfer of mortgage and as an agreement, that is, to Rs 5-0-0 in all

An agreement to lend money does not create an obligation to pay money within clause (b) of section 2 of the Indian Stamp Act (II of 1893)

An agreement to lend money to a partnership is not capable of specific performance and it creates no debt although the breach of it may give rise to a claim for damages

HITWARDHAK COTTON MILLS CO. v. SORABJI

(1909) 32 Bom 426

STATUTE OF FRAUDS (29 CH II, C 3), SEC 7—*Indian Trusts Act* (II of 1882), sec. 1 and 2—*The Trustees and Mortgagees Powers Act* (XXVIII of 1866), sec. 34—*Non applicability to Charitable Trusts.*

See CHARITABLE TRUSTS

... .. 503

STAY OF PROCEEDINGS—*Contempt of Court—Notice of motion for committal—*

*Gordon v. Gordon* [1904] P 163, followed

BAI MOOLDAI v. CHUNILAL PIFANDER

... (1909) 33 Bom 630

STRIDHAN—*Succession—Competition between husband and step son—Mitakshara—Hindu law.*

See HINDU LAW

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SUCCESSION—*Hindu law—Mitakshara—Adopted son—Adoptive mother entitled to succeed in preference to adoptive father* Under the Mitakshara school of Hindu law the adoptive mother is entitled to succeed in preference to the adoptive father, to a son taken in adoption

ANANDI v. HARI SUBA

... (1909) 33 Bom 401

STRIDHAN—*Competition between husband and step son—Mitakshara—Hindu law*

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SUIT FOR PARTITION AND SEPARATE POSSESSION OF JOINT FAMILY PROPERTY—*Valuation for Court fee purposes—Market value of subject matter determines jurisdiction—Jurisdiction—Court Fees Act*

*Hari Sanjay Dutt v. Kala Kumar Patra* (1903) 32 Cal 731, followed

*Dayaram v. Gordhandas* (1903) 31 Bom 73 distinguished.

VACHHANI v. VACHHANI

(1906) 33 Bom 507

SUIT FOR PARTITION AND SEPARATE POSSESSION OF JOINT FAMILY PROPERTY—*Valuation for Court fee purposes—Market value of subject matter determines jurisdiction—Jurisdiction—Court Fees Act* (VII of 1870), sec. 7, cl (iv) (b), sec 7, cl (v)

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- SUMMARY TRIAL**—*Workman's Breach of Contract Act (XIII of 1859)*—*Inquiry under the Act*—*Summary trial not permissible* } An offence under the *Workman's Breach of Contract Act, 1859*, cannot be tried summarily
- Emperor v. Dhondu Krishna* (1901) 33 Bom 22, followed
- EMPEROR v. BALU* . . . . . (1908) 33 Bom 25
- 
- Workman's Breach of Contract Act (XIII of 1859)*, *secs 1, 2*  
*—Court Fees Act (I of 1870)*, *sec 31*—*Court-fee on petition of complaint*—*Liability of workman to pay*.
- See WORKMAN'S BREACH OF CONTRACT ACT* . . . . . 29
- SURVEYOR** . . . . . *Acquisition Act (I of 1894)*  
*—Mark* . . . . . *opposite sales*  
 guided by the opinions of surveyors It is necessary, however, to distinguish opinion from argument . . . . . Court can be guided by the opinion of the land Acquisition itself is . . . . .
- IN THE MATTER OF KARIM TAJ MAHOMED* . . . . . (1905) 33 Bom 335
- TAXATION**—*Pleader's fees*—*Appeals in Probate Proceedings*—*Scale of costs*—*Act I of 1848*, *sec 7*—*Practice* . . . . . 256
- See PRACTICE* . . . . .
- TAXATION OF COSTS**—*Petition*—*Taxing Master*—*High Court Rules, Rule 514*—*Solicitors' retainer denied*, . . . . . 667
- See ATTORNEY'S COSTS* . . . . .
- TAXING MASTER**—*Petition*—*High Court Rules, Rule 514*—*Solicitors' retainer denied*—*Taxation of costs* . . . . . 667
- See ATTORNEY'S COSTS* . . . . .
- TEMPLE, TRUSTEES OF**—*Suit by temple committee against temple servants for declaration as to their right to have the services performed*—*Suit of a civil nature*—*Civil Court*—*Jurisdiction*—*Civil Procedure Code (Act V of 1908)* *sec 9* . . . . . 387
- See CIVIL PROCEDURE CODE* . . . . .
- TEXTS, CONSTRUCTION OF**—*Hindu law*—*Marriage*—*Aura form*—*Brahma form* } It is a principle enunciated by Vyasa that where all smritis are of equal importance and where there is a conflict between two or more writers, the Court is free to choose any it likes . . . . . (1903) 33 Bom. 133
- CHUVILAL v. SURAJRAM* . . . . .
- TIPNIS PANSARE RIGHT**—*Right to levy toll on exports of raddy from foreign territory*—*Such a right is nibandha under Hindu law*—*The right is immovable property*—*Suit to enforce the right in British Courts*—*Jurisdiction* . . . . . 373
- See JURISDICTION* . . . . .
- TITLE**—*Appointment of a committee for management of property*—*Appointment requested in by owner*—*Committee in management for a long time*—*Suit by committee against a trespasser in ejectment*, . . . . . 499
- See EJECTMENT* . . . . .

**TITLE**—*Suit for declaration of ownership—Plaintiff's title proved—Defendants are found to be not inconsistent with plaintiff's ownership—Presumption—Possession goes with title—Adverse possession*

See OWNERSHIP . . . . . 712

deeds of  
notice—  
will—

See MORTGAGE AND MORTGAGEE . . . . . 1

**TODA GIRAS ALLOWANCE ACT (BOM ACT VII OF 1897), SEC. 5**—*Toda Giras allowance—Attachment and sale of the execution of a decree—Money*

of the decree

tion 5 of  
the life  
short of

The words "money likely to become due" in section 5 of the Act must be construed in relation to the time of the judgment—him on account—ment to the date—hat date, and to

Under what circumstances money is likely to become due on account of a *toda giras* allowance is a question which cannot be answered exhaustively and must depend on the facts of each case as it arises

AMARISING V JETHALAL . . . . . (1909) 32 Bom. 218

TRANSACTION . . . . .

See STAMP ACT . . . . . 426

with possession  
undivided  
mortgagee's  
share—

*Suit by sister for recovery of rent—Assignment by lessor not necessary* [On the 14th December 1895 Lingappa mortgaged with possession certain property to Subbaya who on the same day let out the property to Lingappa for twelve years. Subsequently Subbaya having died his interest as mortgagee survived to his undivided brother Ramkrishna. Ramkrishna died in the year 1901 and thereafter possession and management of the property was taken by Subbaya's widow Gowri. She got her name placed on the khata as owner of the property and recovered rent from the tenant for the years 1902 and 1903. The person

entitled to the same

usage for the same

*11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100*

able with rent sued for. Section 50  
882) was applicable inasmuch as the  
acted in good faith and had no notice  
The language of the section is general  
and no assignment by the lessor during the tenancy was necessary.

or the plaintiff's interest in the property. (1908) 33 Bom. 96  
KAVERIAMMA v. LINGAPPA

acknowledgment of the vendor at the  
vendor had also parted with all the  
vendor subsequently mortgaged the  
property to the plaintiff who had no knowledge that the full amount of the con-  
sideration money was not paid to the vendor though he knew that the vendor was  
in possession of some portion of the property.

was estopped from contending that she  
balance of the purchase-money by her  
hole purchase-money and by her act in

*Per DITCHELLOR, J.:*—A vendor of immovable property who endorses upon  
the purchase deed a receipt for the purchase-money cannot set up a lien for  
unpaid purchase money as against a mortgagee for value without notice under  
the purchaser.

TEHILRAM v. KASHIDAS (1906) 33 Bom. 53

Relief Act (witnesses—  
deed in concl  
by him.) A  
to attest it in  
Rel of Act 19

written by him. and sec.  
section 69 of the Transfer of Pro

*Held,* that neither the signature of the Sub Registrar nor the statement by the  
writer that the body of the document was written by him were sufficient for  
effecting a valid mortgage.

An attesting witness is a "witness who has seen the deed executed and who signs  
it as a witness."

*Burdett v. Spilsbury* (1843) 10 C. & F. 310, followed.

RANU v. LAXMANRAO (1908) 33 Bom. 14

Civil Procedure Code (Act XIV of 1882), sec 214. SEC. 93—Decree—Execution—

See DECREE 273

SEC. 107—Lien—Charge—Assign-  
ment—Lease unregistered when admissible in evidence—Conduct of parties to lease

parties and founded upon the law of estoppel

ARDESIR BEJONJI : SYED SIEDAR ALI KHAN

(1908) 33 Bom. 410

**TRESPASSER**—Appointment of a committee for management of property—Appointment acquiesced in by owner—Committee in management for a long time—Suit by committee against a trespasser in ejectment—Title

*See* EFFECTMENT " " " " " 499

**TRIAL**—*Trial by Jury*—*Trial with the aid of assessors*—*Difference in the modes of trial*—*Accused if prejudiced can complain*—*Practice*—*Procedure*—*Criminal Procedure Code (Act V of 1898), see 2E9*

See CRIMINAL PROCEDURE CODE . . . 423

TRUSTEE—Executor—Admoe of Court as to administration of property—  
 Executor continuing as such—Administration amt—Trusts Act (II of 1882),  
 sec. 84

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TRU

VIII OF 1866), sec 31  
Trusts Act (II of 1862),  
sec 7] The Trustees and  
to Charitable Trusts  
repeals amongst other  
the Indian Trusts Act  
and since then, at all  
classes in section 1 of  
on which immediately  
or of  
Prads  
Statute  
India

SIR DINSHA MANEJI PETIT &amp; SIR JAMSERJI JIJIDHAI ... (1905) 3 Bom. 509

**TRUSTEES OF TEMPLE**—*Suit by temple committee against temple servants for declaration as to their right to have the services performed—Suit of a civil nature—Civil Court—Jurisdiction—Civ. Procedure Code (Act V of 1908), sec. 8.*

See CIVIL PROCEDURE CODE . . . . . 387

TRUSTS ACT (II OF 1862) SECS 1 AND 2—*Trustees and Mortgagees Powers Act* (XVIII of 1901), sec. 24—*Non applicability to Charitable Trusts—Statute of Frauds* (29 CH II C 3) sec. 5.] The Trustees and Mortgagees to Charitable Trusts. Section 2 . . . . . 3 repeals amongst other sections . . . . . The Indian Trusts Act was repealed . . . . . II, and since then, at all events . . . . . set on 24 has ceased to have any force. The saving clause in section 1 of the Indian Trusts Act does not affect the repealing section which immediately follows and there is no saving or exception in favour of Charitable Trusts or of

Trustees of properties dedicated to charity. Section 7 of the Statute of Frauds is wholly repealed by section 2 of the Indian Trusts Act. Section 7 of the Statute of Frauds was mainly intended to regulate procedure. It never applied to India at any time, even if it did, the Indian Evidence Act entirely superseded it.

SIR DINSHAH MANIKJI PETIT & SIR JAMSETJI JIJIBHAI . (1908) 33 Bom. 509

TRUSTS ACT (II OF 1882), sec 31—*Executor—Trustee—Idol of Court as to administration of property—Executor continuing as such—Administration suit*.  
So long as an executor occupies that position, he cannot claim the advantages provided for trustees by section 31 of the Indian Trusts Act (II of 1882). If he feels any doubt as to the manner in which he should administer the estate come to his hands his remedy is to file an administration suit.

JAMNAR MAHARAJ & NARAYAN HARI ... (1900) 33 Bom. 127

SEC. 81—*Agreement to pay a certain sum in consideration for a promise to marry—Part payment—Failure of the agreement—Suit to recover part payment—Agreement by way of marriage brokerage—Agreement—Contract—Difference between the two—Contract Act (IX of 1872), secs 2 (a), (h), 20—35, 35*

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TRUSTS TO PERFORM MUKTAD CEREMONIES—*Nature and meaning of Muktd ceremonies—Ceremonies tending towards the abjuration of religion—Tenets of Zoroastrian faith—Practice—How far decision by single Judge binding on his successors*

See MUKTAD CEREMONIES ... 122

VALUATION—*Mode of valuation when no recent sales—Market value—Surveyors' opinions—Objections—Land—Built up from frontage—Hypothetic derived from value of*

See LAND ACQUISITION ACT ... 520

Valuation Act (IX of 1887) sec 8—*Suits for partition and separate possession of joint family property—Valuation for court fee purposes—Market value of subject matter determines jurisdiction—Jurisdiction—Civil Courts Act (I of 1870), sec 7, cl (1) (b) and cl. (c)*

See COURT FEES ACT ... 608

WIDOW—*Adoption by a widow—Valuation by the widow prior to the date of adoption—Right of the adopted son to dispute the alienation—Hindu law*

See HINDU LAW ... 89

Gift of a son by fraternal husband in adoption by widow after her reversion—*Hindu Law—Bharat Ratna Act (XI of 1866) sec 2 3 4 and 5*

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Maintenances—*Widow living in her husband's property in her own house—The property sufficient to maintain her for some years—Suit for maintenance and for arrears of maintenance—Suit to recover maintenance of a female private for*

*Held*, that no cause of action had accrued to the plaintiff. At the date when the suit was brought, the Court was not in a position to forecast events or to anticipate the position of affairs five years later.

DATTATRAYA WAMAN v. RUKHMABAI ... (1908) 33 Bom. 50

WILL—*Mortgage by executors and residuary legatees of property which was subject to a charge under the will—Deposit of title-deeds previously with mortgagees—Constructive notice—Mortgagee's omission to investigate title—Creditors and legatees under will—Lapse of time between testator's death and execution of mortgage, effect of*

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WITNESS—*Defendant summoned for examination—Payment of ba'ta—Deekhan Agriculturists' Relief Act (XVII of 1879) sec 7.*

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— "Adjustment of suit," what is.

See CIVIL PROCEDURE CODE ... 60

— "Agriculturist," meaning of

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— "Appear," meaning of

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— "Danger," meaning of

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— "Earns his livelihood"

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— "Further or other relief," meaning of.

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(1909) 33 Bom 25

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*Summary inquiry into an offence punishable under the Workman's Breach of  
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In a proceeding under the Workman's Compensation Act where the workman  
admits the advance and repays the same it is not competent to the Magistrate to  
make him pay to the complainant the Court fee paid on the petition of com-  
plaint.

EMPEROR v DHONDI

(1904) 33 Bom 23

WRITTEN SUBMISSION—*Suit for administration—Reference to Commissioner—  
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of suit, what is.*

*See* ADMINISTRATION SUIT

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ZOROASTRIAN FAITH TENETS OF—*Trusts to perform Muktad ceremonies,  
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towards the advancement of religion—Practice—How far decision by single  
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*See* MUKTAD CEREMONIES

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